IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

No. 72-534

UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,

Appellants,

v.

JACINTA MORENO, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

RONALD F. POLLACK
ROGER A. SCHWARTZ
NLSP Center on Social
Welfare Policy and Law, Inc.
25 West 43rd Street
New York, New York 10036
Counsel for Appellees

Washington, D.C. • THIEL PRESS • (202) 393-0625

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QUESTIONS PRESENTED

I. Whether the discriminatory "unrelated household" provision in the Food Stamp Act—which denies health-vital food stamp aid to indigents solely because they reside in their homes with persons unrelated to them—is arbitrary and not rationally related to the purposes of the Food Stamp Act, thereby violating indigent-appellees' rights to equal protection?

II. A. Whether the "unrelated household" provision, which penalizes indigents–by withdrawing their health-vital food stamp aid–solely because they exercised their rights to lawfully and peaceably live in their homes with persons unrelated to them, impinges on appellees' freedom of association and right to privacy as guaranteed by the First, Third, Fourth, Fifth and Ninth Amendments to the United States Constitution?

B. Whether the discriminatory "unrelated household" provision, which impinges upon appellees' fundamental privacy and associational rights, is unreasonably tailored and fails to promote a "compelling governmental interest," thus violating appellees' rights to equal protection?

STATUTE AND REGULATIONS INVOLVED

Section 3(e) of the Food Stamp Act of 1964, 7 U.S.C. §2012(e), as amended in 1971 by Section 2(a) of P.L. 91-671, 84 Stat. 2048, provides:

> The term "household" shall mean a group of related individuals (including legally adopted children and legally assigned foster children) or non-related individuals over age 60 who are not residents of an institution or boarding house, but are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common. The term "household" shall also mean (1) a single individual living alone who has cooking facilities and who purchases and prepares food for home consumption; or (2) an elderly person who meets the requirements of section 10(h) of this Act.

7 C.F.R. §270.2(jj) provides:

> "Household" means a group of persons excluding roomers, boarders, and unrelated live-in attendants

necessary for medical, housekeeping or child care reasons, who are not residents of an institution or boarding house, and who are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common:

Provided, That:

(1) When all persons in the group are under 60 years of age, they are all related to each other; and

(2) When more than one of the persons in the group is under 60 years of age, and one or more other persons in the group is 60 years of age or older, each of the persons under 60 years of age is related to each other or to at least one of the persons who is 60 years of age or older. It shall also mean (i) a single individual living alone who purchases and prepares food for home consumption, or (ii) an elderly person as defined in this section, and his spouse.

7 C.F.R. §271.3(a) provides:

Eligibility for and participation in the program shall be on a household basis. All persons, excluding roomers, boarders, and unrelated live-in attendants necessary for medical, housekeeping or child care reasons, residing in common living quarters shall be consolidated into a group prior to determining if such a group is a household as determined in §270.2(jj) of this subchapter.

STATEMENT OF THE CASE

The Food Stamp Act [7 U.S.C. §§2011 *et seq.*] was passed by Congress in 1964, and amended in 1971 [P.L. 91-671 (Jan. 11, 1971), 84 Stat. 2048] as the Federal Government's major step toward remedying the wide-

spread conditions of undernutrition and hunger existing throughout the country. As reflected in the Act's Declaration of Policy [7 U.S.C. §2011], Congress sought to raise the levels of nutrition among all low-income households, and thereby alleviate hunger and malnutrition, by allowing needy households to purchase a nutritionally adequate diet through the use of food stamps.

The operation of the Food Stamp Program is fairly simple: a poverty-stricken household is charged a certain amount of money and in exchange receives food stamps of greater value. The difference between the value of the stamps received—the "coupon allotment"—and the cost of the stamps, is a bonus which provides recipients with a direct increase in food purchasing power. The stamps may be used to purchase domestic food, other than liquor and tobacco, at grocery stores certified by the Agriculture Department to sell food for stamps.

Participation in the Food Stamp Program is limited to impoverished households [7 U.S.C. §2014(a)]. These households are entitled to sufficient stamps so that they can obtain a "nutritionally adequate diet" [7 U.S.C. §§2011, 2013(a) and 2016(a)]. The program is open to both public assistance households and needy non-public assistance households, with the latter group comprising a substantial portion of the total number of food stamp recipients.[1] The Food Stamp Program, therefore, is not an extension of the various welfare programs, but rather,

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[1]According to U.S.D.A. statistics, 38% of the food stamp participants in June 1972 (last month of the fiscal year), were persons who were not receiving public assistance. [Statistical Summary of Operations, Monthly Report for June, 1972, Program Reporting Staff, Food and Nutrition Service, U.S.D.A (Aug. 7, 1972).]

is designed to alleviate the threat of malnutrition among all needy households.

While eligibility in the Food Stamp Program has always been, and currently is, on a household basis, the statutory definition of the word "household" has changed. In 1964, Congress defined household in Section 3(e) of the Food Stamp Act as follows:

> The term "household" shall mean a group of *related or non-related* individuals, who are not residents of an institution or a boarding house, but are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common. The term "household" shall also mean a single individual living alone who has cooking facilities and who purchases and prepares food for home consumption. [7 U.S.C. §2012(e) prior to P.L. 91-671] (emphasis added)

In the amended Food Stamp Act, however, the definition of "household" now states:

> The term "household" shall mean a group of *related individuals* (including legally adopted children and legally assigned foster children) or non-related individuals over age 60 who are not residents of an institution or boarding house, but are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common. The term "household" shall also mean (1) a single individual living alone who has cooking facilities and who purchases and prepares food for home consumption; or (2) an elderly person who meets the requirements of section 10(h) of this Act. [7 U.S.C. §2012(e)] (emphasis added)

By changing the definition of "household" in the Food Stamp Act from "a group of related or nonrelated

individuals" to "a group of related individuals,[2] Congress sought to eliminate politically unpopular "hippies" from food stamp eligibility. In effect, however, the "unrelated household" provision in the Act, and the food stamp regulations promulgated pursuant thereto [7 C.F.R. §§270.2(jj) and 271.3(a)], have resulted in the denial of food stamps to thousands upon thousands of needy persons whose households do not even remotely resemble "hippy communes" and to whom food stamps are the only means through which they can avoid hunger and malnutrition. Indeed, the undisputed evidence in this case indicates that the provision has hardly effected so-called "hippies" at all, but has eliminated the poorest of the poor from health-vital food stamp aid—the unemployed, A.F.D.C. families and migrant laborers [see Appendix, at 43], those persons who are most in need of living with unrelated persons or families in order to conserve meager resources—thereby substantially frustrating the clear purposes of the Food Stamp Program. [7 U.S.C. §2011]

Plaintiff-appellees are all members of needy households financially eligible for food stamp relief. They comprise both public assistance and non-public assistance households that would be able to participate in the Food Stamp Program but for the fact that their households contain one or more unrelated members. They have, therefore, been denied food stamps despite their desperate inability to purchase a "nutritionally adequate diet" [7 U.S.C. §§2011, 2013(a), and 2016(a)] with their present income, and despite the fact that many of them are living with unrelated persons because of the economic

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[2] Unrelated persons over 60 years of age do not disqualify needy persons, living together, from eligibility in the Food Stamp Program.

benefits of combining their meager resources, or for health purposes.

Appellee Jacinta Moreno, of Homestead, Florida, for example, is a 56 year old diabetic in extremely poor health who decided, for health and economic reasons, to live with Ermina Sanchez and the latter's three children. Mrs. Sanchez helps care for appellee Moreno, and, in turn, the two of them share common living expenses. Appellee's monthly income is $75, derived from public assistance. Mrs. Sanchez receives a total monthly income of $133, also derived from public assistance (A.F.D.C.). Out of this income, the household pays: $95 per month for rent, of which appellee pays $40, and $40 a month for gas and electricity, of which $10 is paid by appellee.

In addition to these household expenses, appellee Moreno must spend $10 a month for transportation for her two monthly visits to the hospital, and $5 each month for laundry expenses. Consequently, appellee has only $10 remaining each month with which to purchase food and other necessities. This amount is particularly inadequate for her because of the special foods her poor health demands. Her need for food stamp aid, therefore, is most desperate. Yet, on February 1, 1972, appellee Moreno was denied food stamps solely because she is unrelated to all other members of her household.

Mrs. Moreno has been both wise and fortunate in her association with the Sanchez family. She has been able to create a household in which she can receive care and can pool her meager resources. Within the privacy of her newly-found home, she can best hope to survive these conditions of poor health and low funds. However, as a result of the unrelated household provision in the Food Stamp Act [7 U.S.C. §2012(e)], appellee Moreno is left with this Hobson's choice: she can leave her home and

receive vital Federal food relief, or she can remain with the Sanchez family and attempt to meet her special nutrition and other needs on a maximum of $10 a month.[3] [Appendix, at 23-25]

For plaintiff-appellee Sheilah Ann Hejny of Kernersville, North Carolina, the situation is similarly desperate. Although she, her husband and their three children—ages 5, 3 and 2—comprise an indigent household, the Hejnys took in a twenty year old girl, Sharon Sharp, who is unrelated to them but who had lived next door until she was forced by her mother to leave her home. Sharon has lived with the Hejnys ever since and has become an integral member of the household. She shares in the housekeeping responsibilities of her adopted home and, in turn, receives the love, care and support of the Hejny family.

The stability of this household association has been threatened by the unrelated household provision. Because of their impoverished circumstances, the Hejnys are in great need of food assistance. They have been receiving $144 worth of food stamps monthly at a cost of $14, providing them with $130 in vitally-needed food relief. Soon after Sharon entered their home, however, the Hejnys were denied this vital assistance because their household contained an unrelated member. They have

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[3]Mrs. Sanchez and her three children have been left in a similar predicament. If they continue to reside with appellee Moreno, they too will be cut off much-needed Federal food aid since the Food Stamp Act, and regulations promulgated pursuant thereto, deny relief to persons residing with the "unrelated" person. [7 U.S.C. §2012(e); 7 C.F.R. §§270.2(jj) and 271.3(a)] Prior to the implementation of the unrelated household provision, Mrs. Sanchez and her three children received $108 worth of food stamp coupons per month at a cost of $18—thereby providing them with a crucial $90 in food relief. [Appendix, at 24]

been left with the following dilemma, therefore: either order Sharon out of their home, leaving her homeless, thereby enabling the Hejnys to receive food stamps, or continue their present association with Sharon, but receive no food assistance. The former choice is particularly abhorrent to the Hejnys because of the emotional, physical and psychological improvements they have observed in Sharon since they have taken her in. Yet, the Hejnys must consider the disastrous effects on the health and well-being of their youngsters if they were to go without Federal food assistance. [Appendix, at 28-31]

Plaintiff-appellee Victoria Keppler, who resides in Oakland, California, also feels the brunt of the wide-sweeping unrelated household provision. Her daughter suffers from an acute hearing deficiency and requires educational instruction in a school for the deaf. The only schooling available to her, however, is located in an area where rent costs are high. Since she is dependent on public assistance, appellee Keppler cannot afford the rents in that area. Consequently, she and her two minor children moved into an apartment, not far from the school, with a woman, also on public assistance, to whom appellee is not related. By combining their resources, appellee and her friend are able to afford their rent, and appellee's daughter can attend the nearby school.

Appellee Keppler's fortunate household association, however, has resulted in a major crisis with regard to her ability to feed herself and her children. Prior to living with, and sharing rent costs with her friend, appellee was able to receive food stamps with which she could, albeit barely, purchase a fairly decent diet for her family. Now her family has been denied food stamps aid because of the unrelated household provision. Food stamps are essential to the Kepplers, but their present household

composition is also essential if appellee's daughter is to receive proper educational instruction. Mrs. Keppler must choose between keeping her present household arrangement, that permits her daughter to receive educational instructions, thereby denying her children a nutritionally adequate diet, or change those household arrangements in order to get food relief, thereby depriving her daughter of her educational opportunities.

Appellees instituted a class action in the United States District Court for the District of Columbia to enjoin the enforcement of the unrelated household provisions of the Food Stamp Act and regulations that so drastically threatened the well-being of their households. They argued that these discriminatory provisions impinged upon their association and privacy rights, within the confines of their homes, without promoting a compelling governmental interest and without being rationally related to the purposes of the Food Stamp Program, thereby denying them equal protection of the law. On April 16, 1972, District Judge Smith temporarily enjoined appellants from denying food stamp eligibility to appellees, and other persons similarly situated, on the basis of the challenged provisions. A three-judge District Court convened to hear this case pursuant to 28 U.S.C. §§2282 and 2284. After hearing oral arguments, and upon cross-motions for summary judgment, the District Court ruled that the provisions were invalid under the Due Process Clause of the Fifth Amendment and enjoined the Government from denying food stamp eligibility on the basis of these provisions. Appellants appealed this decision.

SUMMARY OF ARGUMENT

The unrelated household provision in the Food Stamp Act denies food stamp eligibility to households containing persons who are not related to all other members in the household. In doing so, the provision denies vital food relief to the poorest of the poor—those persons living with unrelated persons in order to pay for essential living costs, such as food and shelter. The provision, therefore, discriminates against certain needy households in a manner that is arbitrary and capricious and totally unrelated to the purposes of the Food Stamp Act or any other legitimate governmental purpose.

In addition, the unrelated household provision impinges on poor peoples' freedom of association and right to privacy—in that it penalizes them for exercising their fundamental right to live peaceably and lawfully with whomever they want, in the confines of their homes—but does not actually or reasonably promote a "compelling governmental interest." Consequently, the provision violates appellees' rights to equal protection as guaranteed by the Fifth Amendment to the United States Constitution.

ARGUMENT

I.

THE DISCRIMINATORY DENIAL OF AID TO NEEDY UNRELATED HOUSEHOLDS IS ARBITRARY AND CAPRICIOUS AND NOT REASONABLY RELATED TO ANY PURPOSE OF THE FOOD STAMP ACT.

The unrelated household provision in the Food Stamp Act creates two classes of persons for purposes of food stamp eligibility: *one class* composed of persons financially in need of food stamp relief who reside in households in which all members are related to one another; and *another class* composed of persons similarly in need of food stamp relief, but who live in households that include one or more persons who are unrelated to everyone else in the household. Except for this one difference, members of the latter class are indistinguishable from those in the former class. Solely as a result of this singular distinction, impoverished members in the latter class are denied health-vital food stamp relief while the members in the former class are entitled to such assistance. Such a discriminatory denial of aid is arbitrary and capricious and not reasonalby related to any purpose of the Food Stamp Act and thereby violative of equal protection.

It is well-settled that the Constitutional dictates of equal protection are applicable to the Federal defendant-appellants herein through the Due Process Clause of the Fifth Amendment. [*Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964); *Davis v. Richardson*, 342 F. Supp. 588, 591 (D. Conn. 1972), *aff'd*, 41 U.S.L.W. 3345 (U.S., Dec. 18, 1972); *Griffin v. Richardson*, 346 F. Supp. 1226, 1232 (D. Md.

1972), *aff'd*, 41 U.S.L.W. 3345 (U.S., Dec. 18, 1972); *United States v. Jones*, 384 F.2d 781, 782 (7th Cir. 1967).] Federal officials are not permitted to arbitrarily discriminate against persons in the administration of government benefit programs. [*Shapiro v. Thompson*, 394 U.S. 618, 641-642 (1969); *Davis v. Richardson, supra; Griffin v. Richardson, supra.*]

In the *Davis* decision that was recently affirmed by this Court, the three-judge District Court struck down a provision of the Social Security Act [42 U.S.C. §403(a)(3)] as being violative of the Fifth Amendment's equal protection guarantee. In so doing, the Court set forth the applicability of equal protection to the Fifth Amendment:

> The due process clause of the fifth amendment prohibits, as to the *federal government*, statutes creating arbitrary discriminations which have no rational basis in legitimate governmental purposes. Although there is no specific equal protection guarantee applicable to the federal government, *equal protection standards have been imported into the due process clause of the fifth amendment. Bolling v. Sharpe*, 347 U.S. 497, 74 S. Ct. 693, 98 L.Ed. 884 (1954); *Richardson v. Belcher*, 404 U.S. 78, 81, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971); *Flemming v. Nestor*, 363 U.S. 603, 611, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960); *Bolton v. Harris*, 130 U.S. App. D.C. 1, 395 F.2d 642 (1968). Although Congress has great latitude to make classifications in the area of economic and welfare legislation, *a provision must have some rational basis or be pertinent to some proper objective of the Congress in order to withstand challenge.* [*Davis v. Richardson, supra*, 342 F. Supp., at 591] (emphasis added)

Because the unrelated household provision does not have a rational basis pertinent to the objectives of Congress in passing the Food Stamp Act, it fails to meet the equal protection standards found within the due process clause of the Fifth Amendment and thereby violates that Constitutional guarantee.

A. The Unrelated Household Provision Fails To Promote Any Purpose That Is Reasonably Related to the Purposes of the Food Stamp Act or That Is Constitutionally Permissible.

In a case recently decided by this Court, Chief Justice Burger explained the basic principles governing the application of the Equal Protection Clause. The Chief Justice, in *Reed v. Reed*, 404 U.S. 71, 75-76 (1971), stated:

> In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. *Barbier v. Connolly*, 113 U.S. 27 (1885); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); *Railway Express Agency v. New York*, 336 U.S. 106 (1949); *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

Even more recently, Justice Powell, in delivering the opinion of the Court in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), stated:

> The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, *but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose.* [406 U.S., at 172] (emphasis added)

See, also, *Gulf, Colorado and Sante Fe R. Co. v. Ellis*, 165 U.S. 150, 155 (1897); *Morey v. Doud*, 354 U.S. 457, 465 (1957); *Carrington v. Rash*, 380 U.S. 89, 92-93 (1965); *Rinaldi v. Yeager*, 384 U.S. 305, 308-309 (1966); *Smith v. King*, 277 F. Supp. 31, 38 (M.D. Ala. 1967), *aff'd on other grounds*, 392 U.S. 309 (1968); *James v. Strange*, 407 U.S. 128, 140-141 (1972).

The purposes of the Food Stamp Act, to which the unrelated household provision must be reasonably related if it is to meet the minimal Constitutional requirements, are carefully delineated in the Act's Declaration of Policy. This Declaration states:

> It is hereby declared to be the policy of Congress, in order *to promote the general welfare*, that the Nation's abundance of food should be utilized cooperatively by the States, the Federal Government, local governmental units, and other agencies *to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households.* The Congress hereby finds that the limited food purchasing power of low-income households contributes to hunger and malnutrition among members of such households. The Congress further finds that increased utilization of food in establishing and maintaining adequate national levels of nutrition *will promote the distri-*

bution in a beneficial manner of our agricultural abundances and will strengthen our agricultural economy, as well as result in more orderly marketing and distribution of food. *To alleviate such hunger and malnutrition,* a food stamp program is herein authorized which will permit low-income households to purchase a nutritionally adequate diet through normal channels of trade.[4] [7 U.S.C. §2011] (emphasis added)

It is obvious that the unrelated household provision is not reasonably related, and, in fact, is repugnant, to the afore-quoted purposes of the Food Stamp Act. The exclusion of impoverished and hungry persons from food stamp relief–solely because they reside in households where one or more persons are unrelated to everyone else–cannot in any way: "promote the general welfare"; "safeguard the health and well-being of the Nation's population"; "raise levels of nutrition among low-income households"; "promote the distribution in a beneficial manner of our agricultural abundances"; "strenghthen our agricultural economy"; or "alleviate . . . hunger and malnutrition." Indeed, the only relationship that the unrelated household provision has to the purposes of the Food Stamp Act is that it wholly frustrates those purposes.

It is certainly incontrovertable that the lofty and commercial goals articulated in the Act's Declaration of Policy are not advanced by: denying much-needed food stamps to appellee Moreno, a 56 year old diabetic with $75 monthly income, simply because she resides with a family that provides her with health and economic care; withdrawing food stamp aid from appellee Hejny's family

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[4]See also the District Court Opinion at J.S., App. A, at 15, 17, for a concise description of the purposes of the Food Stamp Act.

because it provided a home, with love and care, for previously unwanted Sharon Sharp; or denying health-vital relief to appellee Keppler because she found housing arrangements that enable her to send her child to a school for the deaf. The appellees and their class, the poorest of the poor—those persons who are unable to pay for housing and other necessities due to severe economic hardship—are precisely the persons sought to be aided by the Food Stamp Program, and yet they are arbitrarily excluded from food relief because, out of brutal necessity, they reside with persons unrelated to them. Clearly the unrelated household provision of the Act is totally unrelated to the accomplishment of any of the Food Stamp Program's purposes.

B. The True Purpose of the Unrelated Household Provision—The Elimination of So-Called "Hippies" From Food Stamp Program Participation—Is a Constitutionally Impermissible Purpose and Is Not Suitably Furthered.

The sole Congressional purpose in enacting the unrelated household amendment in 1971 was to prevent politically-unpopular, so-called "hippies" and "hippy communes" from participating in the Food Stamp Program. Although there is only sparse legislative history on the provision—since it was not contained in either the Senate bill [S. 2547][5] or the House bill [H.R. 18582][6] but was first added in the Conference Committee and hurriedly considered just before the New Year's adjourn-

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[5]See 115 Cong. Rec. 26732-26743, 26845-26888 (1969).

[6]See Cong. Rec., 91st Cong., 2d Sess. (Daily Edition, Dec. 16, 1970), at H11818-H11873.

ment[7] –all of the statements about the provision bear out this Congressional intent.[8] For example, in explaining the Conference Committee's amendment to section 3(e) of the Act [7 U.S.C. §2012(e)], the House conferees stated:

> The House bill did not alter the definition of "household" under section 3(e) of the Act. *The conference substitute includes language which is designed to prohibit food stamp assistance to communal "families" of unrelated individuals.*
>
> The substitute, of course, contemplates that the term "related" shall apply to the relationship between married spouses and to such degree of blood relation and other legal relation (such as adoption and foster children) that the Secretary by regulation may prescribe. The requirement for household members to be related does not apply to persons over 60 years of age. [Conf. Rep. No. 91-1793, as contained in Cong. Rec., 91st Cong., 2d Sess. (Daily Edition, Dec. 22, 1970), at H12267] (emphasis added)

The Senate conferees also made it clear that the provision was designed to exclude "hippy communes" from Program participation. After indicating that "[h]ouseholds consisting of unrelated individuals under age 60 . . . would be excluded" from the Program [Cong. Rec., 91st Cong., 2d Sess. (Daily edition, Dec. 31, 1970), at S21682], Agriculture Committee Chairman Ellender,

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[7]See Cong. Rec., 91st Cong., 2d Sess. (Daily Edition, Dec. 30, 1970), at H12541-H12548; Cong. Rec., 91st Cong., 2d Sess. (Daily Edition, Dec. 31, 1970), at S21681-S21694.

[8]Indeed, the appellants admitted that the only Congressional purpose in enacting the unrelated household provision was to exclude "hippy communes" from food stamp relief. [Appendix to Brief, at 20a.]

on behalf of the Senate conferees, compared the provisions in the Senate, House and Conference versions of the bill:

> *Senate* [section 1(3)] redefines "household" to include an elderly person eligible for the "meals on wheels" program.
>
> *House* does not do this (creating a question as to how elderly persons who do not have cooking facilities can obtain the coupons to be used by them to participate in the "meals on wheels" program).
>
> *Conference Substitute* adopts Senate provision, plus a provision designed to exclude households consisting of unrelated individuals under the age of 60 (*such as hippy communes*). [*Id.*] (emphasis added)

Senator Holland, one of the Senate conferees, also indicated the purpose of the amendment to section 3(e) of the Act [7 U.S.C. §2012(e)]:

> The next change was that the term "household" was further defined so as to exclude households consisting of unrelated individuals under the age of 60, *such as "hippy communes"* which I think is a good provision in this bill. [Cong. Rec., 91st Cong., 2d Sess. (Daily edition, Dec. 31, 1970), at S21690] (emphasis added)

This brief legislative history of the provision—which, according to the research of appellees' counsel, is the only relevant legislative history on the amendment to section 3(e)—clearly verifies that the provision was designed to exclude so-called "hippies" and "hippy communes" from Food Stamp Program participation.[9]

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[9] In a postscript to this legislative history, six Republican members of the Senate Select Committee on Nutrition and Human Needs—Senators Henry Bellmon, Marlow W. Cook, Robert J. Dole, Charles H. Percy, Richard S. Schweiker and Robert Taft, Jr.—spoke

The purpose of the provision was to single out certain persons whose life-styles were offensive to Congress and to deny that group Federal food relief. But, as this Court recently stated in *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972), in all equal protection cases "the crucial question is whether there is *an appropriate governmental interest* suitably furthered by differential treatment. See *Reed v. Reed*, 404 U.S. 71, 75-77 (1971); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972)." (emphasis added) It seems peradventure clear that the denial of food aid to "hippies" does not comprise such an "appropriate governmental interest," but rather reflects a Constitutionally impermissible purpose.

The California Supreme Court, in *Parr v. Municipal Court*, 3 Cal. 3d 861, 92 Cal. Rptr. 153, 479 P.2d 253 (1971), dealt specifically with an issue that was very much on point. In striking down a city ordinance directed against "hippies," the Court stated that "[l]aws are invalidated by the Court as discriminatory because they are expressions of hostility or antagonism to certain groups of individuals." [3 Cal. 3d, at 863] The Court concluded:

> This Court has been consistently vigilant to protect racial groups from the effects of official prejudice, and we can be no less concerned because the human beings currently in disfavor are identifiable by dress and attitudes rather than by color. [3 Cal. 3d, at 870]

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about the implementation of "the so-called 'anti-hippie commune' provision" and denounced the fact that it was being used to cut off families "who might happen to have 'taken in' a friend out of kindness." [Cong. Rec., 92d Cong., 1st Sess. (Daily edition, May 10, 1971), at S6451-S6452]

This Court has consistently invalidated governmental action that was intended to discriminate against groups of persons because of their politically unpopular status. [See, e.g., *Levy v. Louisiana*, 391 U.S. 68 (1968), and *Weber v. Aetna Casualty & Surety Co., supra*–discrimination against illegitimate children; *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) and *Graham v. Richardson*, 403 U.S. 365 (1971)–discrimination on the basis of race and national origin; *Reed v. Reed, supra*–discrimination on the basis of sex; *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966)–discrimination on the basis of wealth; *Schneider v. Rusk*, 377 U.S. 163 (1964)–discrimination on the basis of alienage.] The unrelated household provision–by singling out a politically unpopular group, albeit a group that escapes precise definition–is yet another example of governmental action that seeks to further an impermissible objective. The discriminatory deprivation of health-vital food assistance that results from this provision, therefore, is unconstitutional.

Similarly important, however, is the fact that the unrelated household provision does not even suitably further the provision's impermissible objective. [See *Weber v. Aetna Casualty & Surety Co., supra*, 406 U.S., at 173; *Eisenstadt v. Baird*, 405 U.S. 438, 452-455 (1972)] Although the provision was directed against "hippy communes," its effect is to harm the poorest of the poor–unemployed people, A.F.D.C. recipients and migrant laborers, those persons who are so poor that they must share living expenses with non-family members–not "hippies." As the California Director of Social Welfare indicated:

> The "related household" limitations will eliminate many households from eligibility in the Food Stamp Program. It is my understanding that the Congressional intent of the new regulations are specifically

aimed at the "hippies" and "hippie communes". Most people in this category can and will alter their living arrangements in order to remain eligible for food stamps. However, *the AFDC mothers who try to raise their standard of living by sharing housing will be affected.* They will not be able to utilize the altered living patterns in order to continue to be eligible without giving up their advantage of shared housing costs.

In California it is a common practice for the very poor to "move in" with friends during unemployment, or any type of crisis. Many of the migrant labor camps are so constructed that the people living there cannot be eligible on the basis of "related household". This section will eliminate a segment of the migrant workers who by definition are to be eligible for food stamps. We have found no way to "interpret" so these migrants in this type of camp can be eligible. [App., at 43] (emphasis added)

Thus, Congress has failed to achieve the impermissible purpose of eliminating "hippies" from Food Stamp Program participation, but has tragically and substantially harmed the very persons it set out to assist. The unrelated household provision, therefore, undermines Congressional Food Stamp Program purposes seeking "[t]o alleviate . . . hunger and malnutrition" and frustrates the efforts that "will permit low-income households to purchase a nutritionally adequate diet through normal channels of trade." [7 U.S.C. §2011] Such a result, however, was not wholly unpredictable insofar as Congress gave scant thought to the provision. As the District Court most aptly phrased it:

The fact is that we are confronted, as was the Secretary of Agriculture, with hasty, last-minute

> Congressional action—"a child born of the silent union of legislative compromise." *Rosado v. Wyman*, 397 U.S. 397, 412, 90 S.Ct. 1207, 1218, 25 L.Ed. 2d 442 (1970). As an obvious afterthought to its reexamination of the food stamp program through the normal legislative process, Congress apparently thought it prudent to exclude what it assumed to be an easily identifiable and easily separable group. That group, however, has proven to be not so facilely ascertainable; and the classification has achieved results which were apparently unintended.[10] [345 F. Supp., at 315]

In sum, this statutory provision was not considered by Congress with any degree of precision; it sought to implement a Constitutionally impermissible objective; it failed to reasonably further that objective; and, instead, denied health-vital Federal food relief to the persons most in need of it, completely contrary to the Food Stamp Act's purposes. [7 U.S.C. §2011] As a result, the provision's discriminatory denial of essential food stamp

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[10] After the Senate-House Conference, a statement by Congressman Poage—Chairman of the House Agriculture Committee and the leader of the House Conference delegation—reflected the hurried atmosphere with which Congressmen and Senators were first exposed to the unrelated household provision just before the New Year's adjournment:

> In view of the lateness in this session, it seems desirable to us that we accept this conference report if we are going to have assurance of a continuation of assistance to millions of deserving people. It should be perfectly clear, as I see it, that there is no chance whatever to extend the present law for 6 months, for 6 weeks, or for 6 days. I, therefore, would urge my colleagues to vote for the adoption of the conference report lest the food stamp program be allowed to expire. [Cong. Rec., 91st Cong., 2d Sess. (Daily edition, Dec. 30, 1970), at H12543]

aid to the appellees is violative of their rights to equal protection.

C. Appellants Have Failed To Produce a Legitimate Purpose That Is Suitably Furthered by the Unrelated Household Provision.

Appellants have based much of their defense on the proposition that this Court must uphold the unrelated household provision if any reasonable basis for the provision can be found, i.e., if any reasonable purpose for the provision could be attributed to Congress. Indeed, they have searched in vain for such a basis ever since this action was brought and have asked the Judiciary to actively join in this search. Their initial foray, during the oral argument on the motion for a temporary restraining order, failed to turn up any reasonable basis. The transcript of the oral argument provides the following exchange on this issue:

> THE COURT: How is the regulation rationally related to the Act?
>
> MR. BRICKFIELD: Your Honor–
>
> THE COURT: The purposes of the Act?
>
> MR. BRICKFIELD: It is rational to the extent that the Act goes so far and no farther. It is a question of Congress stopping after giving so many people so much benefit and what we feel plaintiffs are complaining of here, they did not get in and they are not included and admittedly, some Plaintiffs were included previously, but Congress just has not gone quite that far, and I think Congress can choose how far to go and how far not to go in granting benefits of this nature.
>
> Until recently, Puerto Rico did not receive equal– did not receive social security benefits. There are

certain social security benefits that the citizens of Puerto Rico do not receive and this was challenged quite recently and it is on appeal before the First Circuit, the question of whether this was a denial of equal protection to the residents of Puerto Rico to deny them social security benefits.

The District Court answered in the affirmative and said it was not a denial of equal protection.

I don't think Congress has to give food stamps to everyone. I think they can be allowed to give them to whom they want.

THE COURT: On some rational basis?

MR. BRICKFIELD: Yes.

[Appendix to this Brief, at 4a-5a]

Between the argument on the temporary restraining order motion and the argument before the three-judge District Court, appellants had ample opportunity to discover a rational basis for the unrelated household provision. Yet, although they knew that such a search would be crucial for their case, and although they had filed a motion for a summary judgment, the appellants began their presentation by stating that *if the Court could not find a rational basis* for the unrelated household provision, then an evidentiary hearing should be provided "to determine if in fact there is a rational basis." [Appendix to Brief at 10a-11a]

In order to search for a Congressional purpose, Circuit Judge McGowan sought to find out whether the provision was intended to promote morality. [See Appendix to Brief, at 20a] In response, Justice Department attorney Brickfield indicated that "the only congressional contention [sic] that we see is the congressional intention that the hippy communes would not be included. What

morality we can read into that, I am not sure."[11] [Appendix to Brief, at 20a] In essence, the appellants' position was that the Court should somehow, somewhere find a rational basis for the unrelated household provision:

> We want you to find that there was some rational basis, rational set of facts somewhere that Congress could have passed this Act on, and if you can find that, then this statute must be upheld. That is what we contend Flemming versus Nestor is. [Appendix to Brief, at 22a]

Although, throughout the District Court proceedings, the appellants never specified any purpose to which the unrelated household provision was rationally related, the appellants inferred that numerous Federal undertakings–such as taxation and the public welfare programs–seem to seek the maintenance of family ties. [Appendix to Brief, at 21a and 23a; see also, *id.*, at 18a] While the appellants never alleged that this purpose should be imputed to the unrelated household provision, the three-judge District Court probed the appellants on that subject. In responding to the Court's question thereon, the appellants conceded that an individual living alone is not disqualified by the unrelated household provision from the receipt of food stamp assistance; to the contrary, individuals who live alone–regardless whether they have abandoned their spouses, children and/or other relatives–are entitled to food stamp aid if they are poor.

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[11] In their Brief to this Court, appellants have indicated that the District Court proceeded "on the erroneous assumption that the purpose of the classification is the regulation of morality." [Appellants' Brief, at 9] Clearly, therefore, the promotion of morality was not a purpose of Congress and is not relevant to the present proceeding.

[*Id.*, at 19a; 7 U.S.C. §2012(e); 7 C.F.R. §§270.2(jj) and 271.3(a)]

That the unrelated household provision was not intended to, and does not, promote the maintenance of family ties, is manifestly clear. Persons are not penalized for breaking up their families, obtaining divorces, abandoning their children, or the like, by the unrelated household provision. Indigents–like appellee Hejny's family, appellee Keppler's family, and the Sanchez family (who reside with appellee Moreno)–are denied food stamps only if an unrelated person moves into their household. Even though their families have remained intact and live together in general harmony they are nevertheless denied health-vital food stamp relief. The provision, therefore, does not seek to maintain the family relationship, nor does it penalize persons for dissolving or attenuating that relationship; it merely penalizes those families that have aided a friend, or other family, in need of assistance. Indeed, aside from ousting the non-related person from the household, the only way indigent members of appellees' families can obtain food stamp relief is if they leave their homes and set up another household, and apply for food stamps, apart from their families. Appellants, therefore, appropriately failed to ascribe–in their Brief to this Court–the maintenance of the family relationship as a basis for upholding the Constitutionality of the unrelated household provision. [See, also, *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Mindel v. United States Civil Service Commission*, 312 F. Supp. 485 (N.D. Calif. 1970).]

In their Brief to this Court, appellants–for the first time–have imaginatively ascribed an alleged purpose for the provision here at issue: the prevention of Program

abuses, particularly the perpetration of fraud.[12] [Appellants' Brief, at 14-15] Insofar as the prevention of fraud is a legitimate and vital concern for the Congress—as indeed it is for the appellees who, inevitably, must suffer due to wrongful deeds of less needy, sometimes affluent, persons—appellees "do not question the importance of that interest; what we do question is how the challenged statute will promote it." [*Weber v. Aetna Casualty & Surety Co., supra*, 406 U.S., at 164] The denial of aid to unrelated households clearly has no "fair and substantial relation to the [alleged] object of the legislation." [*Reed v. Reed, supra*, 404 U.S., at 76; *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); see, also, Gunther, "The Supreme Court 1971 Term Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For A Newer Equal Protection," 86 Harv. L. Rev. 1, 20-40 (1972).]

Contrary to appellants' unsupported allegations, the undisputed evidence in this case indicates that the

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[12] Merely short shrift need be given to appellants' unsupported assertion—contained in only one sentence in their Brief [at 14], and not argued in the Court below—that Congress could reasonably assume that related households contain the persons with "the greatest need for assistance." Appellants' undocumented assertion is clearly erroneous; in fact, the opposite is true. Whenever different indigent families double up into one household, or whenever an unrelated person is permitted to live with a family, it is frequently because the families or persons are so poor that they need to share living expenses, particularly rent and food costs. It is usually the impoverished A.F.D.C. mother and her children, or the unemployed person, or migrant laborers—the poorest of the poor—who must double up with another family so that necessities, particularly shelter and nutrition, are more adequately provided. [Appendix, at 43] At any rate, it is peradventure clear that unrelated indigent households cannot be reasonably deemed less needy than related indigent households.

incidence and detection of fraud is essentially uneffected by the unrelated household provision. Persons intending to abuse the Program "can and will alter their living arrangements in order to remain eligible for food stamps" [Appendix, at 43]; but the poorest of the poor—the persons most substantially affected by the unrelated household provision and the ones least able to change their living arrangements—will be eliminated from food stamp relief in direct frustration of Congressional purposes.[13] As in *Dunn v. Blumstein*, 405 U.S. 330, 346

[13]Aside from frustrating the clearly expressed Program purposes in the Food Stamp Act's Declaration of Policy [7 U.S.C. §2011], the effect of the unrelated household provision runs completely counter to the purposes of the Act's 1971 amendments. Rather than substantially curtailing the availability of Program benefits to the poorest of the poor—as the unrelated household provision unwittingly accomplishes—the 1971 Food Stamp Act amendments sought to expand Program coverage and benefits. The 1971 amendments: (1) increased food stamp eligibility standards by raising the low state eligibility standards to a much higher uniform nationwide standard, thereby assisting several million additional poor persons [see 7 U.S.C. §2014(b) before and after the passage of P.L. 91-671, 84 Stat. 2048; Cong. Rec., 91st Cong., 2d Sess. (Daily edition, Dec. 31, 1970), at S21683 (statement by Senator McGovern); Cong. Rec., 91st Cong., 2d Sess. (Daily edition, Dec. 31, 1970), at S21694 (statement by Senator Dole)]; (2) permitted persons without income, for the first time, to obtain food stamps for free [see 7 U.S.C. §2016(b), before and after the passage of P.L. 91-671, 84 Stat. 2048; Cong. Rec., 91st Cong., 2d Sess. (Daily edition, Dec. 31, 1970), at S21682 (statement of Senator Ellender and Explanation of Food Stamp Conference Report); Cong. Rec., 91st Cong., 2d Sess. (Daily edition, Dec. 30, 1970), at H12543 (statement by Congressman Quie)]; (3) guaranteed that coupon allotments would be sufficient to obtain a "nutritionally adequate diet," rather than a diet that is "*more nearly*" sufficient [compare 7 U.S.C. §§2011, 2013(a) and 2016(a) before and after P.L. 91-671, 84 Stat. 2048]; (4) permitted the implementation of both the Food Stamp and

(1972)—where the Court concluded that "[s]ince false swearing [about having lived in the State for one year] is no obstacle to one intent on fraud, the existence of burdensome voting qualifications like durational residence requirements cannot prevent corrupt nonresidents from fraudulently registering and voting"—the unrelated household provision is unlikely to deter non-poor, corrupt individuals from cheating in the Food Stamp Program.

The only sections that are truly rationally related to the purpose of food stamp abuse prevention have, in contrast, "a fair and substantial relation to the object of the legislation." [*Reed v. Reed, supra*, 404 U.S., at 76; *Royster Guano Co. v. Virginia, supra*, 253 U.S., at 415] Those sections impose substantial criminal sanctions against persons who have perpetrated food stamp fraud [see 7 U.S.C. §§2023(b) and (c)] and require able-bodied persons to register for, and accept, work—or lose their food stamp entitlements. [7 U.S.C. §2014(c)] In contrast with the unrelated household provision, the prevention of Program abuses is "suitably furthered by the differential treatment" [*Police Department of Chicago v. Mosley, supra*, 408 U.S., at 95; citing *Reed v. Reed, supra*, 404 U.S., at 75-77; *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Dunn v. Blumstein, supra*, 405 U.S., at 335] accorded in the criminal sanctions and forced work sections of the Food Stamp Act. Clearly the contrast in sections demonstrates how unreasonably the unrelated household provision is suited to the prevention of Program abuses.

Commodity Distribution Programs to occur in the same area under certain circumstances [7 U.S.C. §2013(b); see *Sloan v. United States Department of Agriculture*, 335 F. Supp. 816 (W.D. Wash. 1971)]; and (5) radically increased the appropriation authorization levels for the Food Stamp Program. [7 U.S.C. §2025(a)]

Appellants' sole justification for the provision, therefore, rests with their unsupported assertion that it is somehow more administratively cumbersome and costly to detect Program abuses in unrelated households. Although the undisputed evidence herein seems to belie this assertion [Appendix, at 43], it is well-settled that administrative convenience and preservation of the fisc do not independently justify discriminatory classifications. As the Court stated in *Stanley v. Illinois*, 405 U.S. 645, 656 (1972):

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Similarly, in *Shapiro v. Thompson, supra*, 394 U.S., at 633, the Court stated:

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saved

money. The saving of welfare costs cannot justify an otherwise invidious classification.

See *Reed v. Reed*, 404 U.S. 71, 76-77 (1971); *Carrington v. Rash*, 380 U.S. 89, 96 (1965); *Bell v. Burson*, 402 U.S. 535, 540-541 (1971); *Dunn v. Blumstein*, 405 U.S. 330, 350-351 (1972). See also, *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970).

In sum, appellants' search for a rational relationship, between the purposes of the Food Stamp Act and the unrelated household provision, has proved fruitless. It seems reasonable, therefore, that this wide-ranging search finally ends and that it is deemed clear that Congress, in its haste, passed a provision that does not reasonably further a legitimate governmental interest. Since the unrelated household provision so harmfully discriminates against the indigent appellees and their class, and since the discriminatory denial of crucial food relief is not founded in the reasonable furtherance of a legitimate governmental purpose, the provision violates appellees' rights to equal protection.

II.

THE DISCRIMINATORY FOOD STAMP UNRELATED HOUSEHOLD PROVISION, WHICH IMPINGES UPON APPELLEES' ASSOCIATION AND PRIVACY RIGHTS, IS NOT CONSTITUTIONALLY JUSTIFIED INSOFAR AS IT DOES NOT PROMOTE A COMPELLING GOVERNMENTAL INTEREST.

A. Discriminatory Governmental Action, That Impinges Upon Fundamental Rights, Is Unconstitutional Unless Such Action Is Necessary To Promote a Compelling Governmental Interest.

Whenever discriminatory governmental actions impinge upon fundamental personal rights or liberties, those actions are more closely scrutinized by the Federal Judiciary. If such actions are to be deemed Constitutional, they must not only be rationally related to a valid governmental purpose, but they must be *necessary to the achievement of a compelling governmental interest.* As the Supreme Court stated in *Harper v. Virginia Board of Education,* 383 U.S. 663, 670 (1966):

> We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.

That a stricter test must be utilized, when discriminatory governmental action invades fundamental Constitutional rights, is well-settled by *Shapiro v. Thompson*, 394 U.S. 618 (1969). In that case, the Court invalidated the one-year durational residence requirements in the public assistance programs. The Court noted that the residence requirements deterred indigents from exercising their freedom to travel [394 U.S., at 629-631] and then held:

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> At the outset, we reject appellants' argument that a mere showing of a rational relationship between the waiting period and . . . permissible state objectives will suffice to justify the classification. [citing several cases] The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from State to State or to the District of Columbia *appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.* [394 U.S., at 634] (emphasis added)

Before and, more frequently, after the *Shapiro* decision, the Court has made manifestly clear that discriminatory governmental action, impinging upon fundamental rights and liberties, can only be justified if it promotes a compelling governmental interest. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)–where the discriminatory governmental action impinged on the right to procreate; *Bullock v. Carter*, 405 U.S. 134, 144 (1972), *Dunn v. Blumstein*, 405 U.S. 330, 335-337 (1972), *Kramer v. Union Free School District*, 395 U.S. 621, 627-628 (1969), *Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969), *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670 (1966)–where the discriminatory governmental action impinged on the right to vote;[14] *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968)–where the discriminatory governmental action impinged on the right to associate and the right to vote;[15] *Police Depart-*

[14] See, also, *Reynolds v. Sims*, 377 U.S. 533, 561-562, 565 (1964).

[15] See, also, *Boddie v. Connecticut*, 401 U.S. 371 (1971), and the explanation thereof in *United States v. Kras*, 41 U.S. L.W. 4117, 4121 (U.S., Jan. 10, 1973), wherein Justice Blackmun,

ment of the City of Chicago v. Mosley, 408 U.S. 92, 95, 98-99, 101 (1972)—where the discriminatory governmental action impinged on the free speech right to picket;[16] *Dunn v. Blumstein*, 405 U.S. 330, 338-343 (1972), *Graham v. Richardson*, 403 U.S. 365, 375-376 (1971), *Shapiro v. Thompson*, 394 U.S. 618, 629-631, 634 (1968)—where the discriminatory governmental action impinged on the right to travel; *Griffin v. Illinois*, 351 U.S. 12, 16-17 (1956), *Mayer v. City of Chicago*, 404 U.S. 189, 193-194, 196-197 (1971)—where the discriminatory action, denying trial court transcripts, impinged upon the right to appeal.[17] Clearly, therefore, the Court has uniformly and unequivocally held that discriminatory actions, impinging on fundamental rights and liberties, can only be justified if those actions are necessary to promote a compelling governmental interest.

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speaking for the Court, indicated that the discriminatory denial of access to divorce proceedings contested in *Boddie* was strictly scrutinized because it "touched directly . . . on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship." The Court went on to indicate that the "*Boddie* appellants' inability to dissolve their marriages seriously impaired their freedom to pursue other protected associational activities." [*id.*] Cf. *Loving v. Virginia*, 388 U.S. 1 (1967).

[16] Cf. *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951) and *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

[17] The Court's decisions on the question of free transcripts for indigents include: *Wade v. Wilson*, 396 U.S. 282 (1970); *Williams v. Oklahoma City*, 395 U.S. 458 (1969); *Gardner v. California*, 393 U.S. 367 (1969); *Roberts v. LaVallee*, 389 U.S. 40 (1967); *Long v. District Court of Iowa*, 385 U.S. 192 (1966); *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Draper v. Washington*, 372 U.S. 487 (1963); *Lane v. Brown*, 372 U.S. 477 (1963); *Coppedge v. United States*, 369 U.S. 438 (1962); and *Eskridge v. Washington Prison Bd.*, 357 U.S. 214 (1958).

B. The Discriminatory Food Stamp Unrelated Household Provision Impinges Upon Appellees' Freedom of Association and Right to Privacy.

The coercive effects of the Food Stamp Act's unrelated household provision [7 U.S.C. §2012(e)] are very clear. Poor persons, who reside together in order to conserve their meager resources, are penalized by the appellants because they are unrelated to one another. Although they are very much in need of health-vital Federal food assistance, and although they are otherwise eligible for such relief, they are denied such aid solely because they live under the same roof with others who are unrelated to them. In short, the unrelated household provision directly and substantially interferes with appellees' freedom of association and right to privacy: the provision impinges on appellees' rights to lawfully associate with whomever they wish, in the confines of their own home, by denying them health-vital food aid as a result of their exercise of those rights. The results are tragic.

Appellee Jacinta Moreno, for example, must live with people unrelated to her if she is to survive. As a 56 year old diabetic with a total monthly income of $75, she is unable to face the economic and health rigors of daily life without substantial aid from others. By moving into the same house occupied by another (the Sanchez) family, she shares housing costs and is consequently able to live in decent accommodations for only $40 a month. But, after paying for utilities ($10 a month), bi-weekly visits to the hospital ($10 a month) and laundry ($5 a month), she has only $10 a month left for food, clothing, hygienic necessities, transportation costs, and all other necessities. Particularly since appellee Moreno requires a special diet for her health condition, she is in vital need of Federal

food assistance. As a result of the unrelated household provision, however, she must make the following Hobson's choice: *either* stay in the same household and be denied essential food relief, *or* receive food stamps and leave the household, thereby suffering new and severe economic and health problems.[18] [See Appendix, at 23-25]

For appellee Sheilah Ann Hejny, the options have been similarly tragic. Although her family is poor, appellee Hejny took in a young girl—Sharon Sharp—who was a former neighbor and was abandoned by her parents. Since Sharon had never lived in a home environment that provided her with love, care and security, moving in with the Hejny family was most helpful to Sharon's emotional, physical and psychological well-being. Unfortunately, solely as a result of Sharon's presence in the home, the Hejnys were disqualified from much-needed food stamp assistance. Therefore, they could either order Sharon out of the home in order to get food relief, or they could continue to live with her and remain undernourished. [See Appendix, at 28-31]

For appellee Victoria Keppler, the unrelated household provisions have left her also with very unfortunate alternatives. One of her daughters must attend a school for the deaf in Oakland in order to receive educational

[18] In many respects, the decision to live with the Sanchez family is not left entirely with appellee Moreno. Since the Sanchez family is poor, and has been relying on food stamp aid in order to sustain Mrs. Sanchez and her three youngsters, there is a great but tragic incentive to force Mrs. Moreno out of their house. [See Appendix, at 23-25] Under the unrelated household provisions in the Food Stamp Act and regulations promulgated pursuant thereto [7 U.S.C. §2012(e); 7 C.F.R. §§270.2(jj) and 271.3(a)], the Sanchez family is not permitted to receive food stamps as long as an unrelated person—such as appellee Moreno—lives with them.

instruction. However, the school is located in an area where rent costs are relatively high, and since appellee Keppler is a welfare recipient, she cannot afford to pay the rents there. Consequently, appellee Keppler's family moved into an apartment, not far from the school, with an unrelated woman friend who is also a welfare recipient and who has sought shared living expenses. By sharing the rent costs, they can barely pay for the rent. Although the Keppler family is very much in need of food stamp aid, Mrs. Keppler and her children—as a result of the unrelated household provision—can only get such relief if they move out of their home, thereby making it impossible for Mrs. Keppler's daughter to attend school. [See Appendix, at 26-27]

Clearly the unrelated household provision is not only harmful to appellees' severe economic plight, but the provision violates their freedom of association and rights to privacy. Faced with the brutal need of food relief for themselves and/or their loved ones, appellees are forced to surrender their fundamental right, to choose whom they wish to lawfully associate with in the confines of their home, or suffer grievous conditions of hunger and undernutrition. By penalizing appellees for exercising their inalienable freedom of association and right to privacy, the appellants are violating the Constitution.

It is well-settled that governmental action such as this, which deters or penalizes the exercise of Constitutional rights, is as defective as action that specifically prohibits the exercise of such rights. [See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Dunn v. Blumstein*, 405 U.S. 330, 338-342 (1972); *Speiser v. Randall*, 357 U.S. 513 (1958); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 155-156 (1946); *Flemming v. Nestor*, 363 U.S. 603, 611 (1960); *Shapiro v. Thompson*, 394 U.S. 618, 629, 634, 638, n. 21

(1969)] This Constitutional principle is applicable regardless of whether the deterrence or penalization flows from the conditional withdrawal of a right or a privilege.[19]

In *Sherbert v. Verner, supra,* a Seventh-Day Adventist had been denied unemployment compensation because she had refused to work on Saturday, the Sabbath Day of her faith. Benefits were denied because she allegedly "failed, without good cause ... to accept available suitable work when offered ... by the employment office or the employer." [374 U.S., at 401] Holding that the disqualification imposed a "burden upon the free exercise of appellant's religion," [374 U.S., at 403], the Court said:

> It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.[20] [374 U.S., at 404]

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[19] Constitutional rights cannot be bartered by the government for such benefits as unemployment compensation [*Sherbert v. Verner, supra*]; property tax exemptions [*Speiser v. Randall, supra*]; Social Security benefits [*Flemming v. Nestor, supra*]; the provision of second class mailing privileges [*Hannegan v. Esquire, Inc., supra*]; public welfare [*Shapiro v. Thompson, supra, Graham v. Richardson,* 403 U.S. 365 (1971)]; and government employment [*Mindel v. United States Civil Service Commission,* 312 F. Supp. 485 (N.D. Calif. 1970)].

[20] In a footnote, the Court cited other cases in which conditions and qualifications upon governmental privileges and benefits had been invalidated because of their tendency to "inhibit constitutionally protected activity." [374 U.S., at 404, n. 6]. The Court cited the following cases: *Steinberg v. United States,* 143 Ct. Cl. 1, 163 F. Supp. 590; *Syrek v. California Unemployment Ins. Board,* 54 Cal.2d 519, 354 P.2d 625; *Fino v. Maryland Employment Security Board,* 218 Md. 504, 147 A.2d 738; *Chicago Housing Authority v. Blackman,* 4 Ill.2d 319, 122 N.E.2d 522; *Housing Authority of Los Angeles v. Cordova,* 130 Cal. App.2d 883, 279

Similarly in *Shapiro v. Thompson, supra,* in which the one-year durational residence requirement for obtaining welfare assistance was invalidated because it violated equal protection and impinged on plaintiffs' freedom to travel, the Supreme Court said:

> If a law has "no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional." (citing *United States v. Jackson,* 390 U.S. 570, 581 (1968)) [394 U.S., at 631]

Clearly this principle is applicable to the present case. The indigent appellees are denied vital Federal food sustenance solely because they have chosen to exercise their freedom of association and right to privacy. Appellees should not be penalized for exercising their fundamental right to lawfully associate with whomever they wish in the confines of their home, just as the litigants in *Shapiro* should not have been penalized for exercising their right to travel.

Although the "compelling governmental interest" test in *Shapiro* was triggered due to the penalization of the litigants' exercise of a fundamental right, appellants unreasonably and erroneously seek to distinguish the *Shapiro* case from the instant litigation. [See Appellants' Brief, at 10-11] After noting that the Court found that the *purpose* of the welfare residence requirements was "inhibiting migration by needy persons" [394 U.S., at 629], the appellants seek to distinguish *Shapiro* by asserting that "it is not the *purpose* of the statutory

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P.2d 215; *Lawson v. Housing Authority of Milwaukee,* 270 Wis. 269, 70 N.W.2d 605; *Danskin v. San Diego Unified School District,* 28 Cal.2d 536, 171 P.2d 885; *American Civil Liberties Union v. Board of Education,* 55 Cal.2d 67, 359 P.2d 45. Cf. *Baltimore v. A.S. Abell Co.,* 218 Md. 273, 145 A.2d 111.

classification here in question directly to inhibit exercise" of appellees' association and privacy rights. [See Appellants' Brief, at 11] (emphasis added). Appellants' reliance on the absence of invidious Congressional intentions, however, is misplaced. Surely Congress did not intend to impinge on fundamental Constitutional rights when it enacted this provision. But this provision (which the District Court correctly found was the product of "hasty, last minute Congressional action–'a child born of the silent union of legislative compromise' ",[21] [citing *Rosado v. Wyman*, 397 U.S. 397, 412 (1970); 345 F. Supp., at 315] *does in fact penalize* impoverished and hungry persons for the exercise of their association and privacy rights.

In a recent case, the Court was confronted with the same argument raised by the appellants herein, seeking to distinguish *Shapiro* by focussing on whether the Constitutional impingement was intended, rather than whether the exercise of a Constitutional right was penalized. In

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[21] That Congress never carefully considered the Food Stamp Act's unrelated household provision [7 U.S.C. §2012(e)] is obvious. Neither this provision, nor any other one vaguely similar thereto, was considered by either Congressional House until the Conference Committee bill was submitted just before the New Year's adjournment date. Neither the Senate bill [S. 2547] nor the House bill [H.R. 18582] contained a provision remotely analogous to the unrelated household provision. That provision was considered for the first time during the hasty, waning moments of the Ninety-first Congress when the Conference bill–containing numerous other provisions, many of them more controversial to the Congressmen and Senators–was submitted to both Houses. [See Cong. Rec. 91st Cong., 2d Sess. (Daily Edition, Dec. 30, 1970), at H 12541-H 12548]; Cong. Rec., 91st Cong., 2d Sess. (Daily Edition, Dec. 31, 1970), at S 21681-S 21694] Clearly this provision was not given careful consideration.

Dunn v. Blumstein, supra, wherein the Court considered the constitutionality of durational residence requirements for voting, the Court rejected this distinction; the Court held that it is merely necessary to demonstrate that the governmental action served to penalize the exercise of a Constitutional right:

> Tennessee attempts to distinguish *Shapiro* by urging that "the vice of the welfare statute in *Shapiro* . . . was its objective to deter interstate travel." Appellants' Brief 13. In Tennessee's view, the compelling state interest test is appropriate only where there is "some evidence to indicate a deterrence of or infringement on the right to travel . . . ." *Ibid.* Thus, Tennessee seeks to avoid the clear command of *Shapiro* by arguing that durational residence requirements for voting neither seek to nor actually do deter such travel. In essence, Tennessee argues that the right to travel is not abridged in any constitutionally relevant sense.
>
> This view represents a fundamental misunderstanding of the law. It is irrelevant whether disenfranchisement or denial of welfare is the more potent deterrent to travel. *Shapiro* did not rest upon a finding that denial of welfare actually deterred travel. Nor have other "right to travel" cases in this Court always relied on the presence of actual deterrence. In *Shapiro* we explicitly stated that the compelling state interest test would be triggered by "any classification which serves to *penalize* the exercise of that right [to travel] . . . ." *Id.*, at 634 (emphasis added); see *id.*, at 638 n. 21. While noting the frank legislative purpose to deter migration by the poor, and speculating that "[a]n indigent who desires to migrate . . . will doubtless hesitate if he knows that he must risk" the loss of benefits, *id.*, at 629, the majority found no need to dispute the

evidence that few welfare recipients have in fact been deterred [from moving] by residence requirements." *Id.*, at 650 (Warren, C.J., dissenting); see also *id.*, at 671-672 (Harlan, J., dissenting). Indeed, none of the litigants had themselves been deterred. Only last Term, it was specifically noted that because a durational residence requirement for voting "operates to *penalize* those persons, and only those persons, who have exercised their constitutional right of interstate migration . . ., [it] may withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest." *Oregon v. Mitchell*, 400 U.S., at 238 (separate opinion of Brennan, White, and Marshall, J.J.) (emphasis added)

> . . . The right to travel is an "*unconditional* personal right," a right whose exercise may not be conditioned. *Shapiro v. Thompson*, 394 U.S., at 643 (Stewart, J., concurring) (emphasis added); *Oregon v. Mitchell, supra*, at 292 (Stewart, J., concurring and dissenting, with whom Burger, C.J., and Blackmun, J., joined). Durational residence laws impermissibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right. [405 U.S., at 339-342]

Similarly, since the unrelated household provision at issue here penalizes indigents because they exercised their constitutionally-protected association and privacy rights, the provision can only withstand judicial scrutiny if it is necessary to promote a compelling governmental interest.

C. The Constitution Protects Appellees' Fundamental Freedom of Association.

The right to freedom of association has always been a fundamental guarantee of American society. De Tocqueville, in his famous treatise on early America, indicated how important freedom of association is to this country and any democratic society. In *Democracy in America*, he wrote:

> The most natural privilege of a man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society. [de Tocqueville, *Democracy in America*, Bradley ed. (1954), at 203]

As a result of its fundamental place in American society, freedom of association has been guaranteed by the Constitution's Bill of Rights. As evidenced by a multitude of decisions, the inalienable right of freedom of association has been most vigilantly protected by the Supreme Court.[22] As Justices Black and Douglas stated in their concurring opinion in *Bates v. City of Little Rock*, 361 U.S. 516, 528 (1960):

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[22] See, e.g., *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 460-461 (1958); *Shelton v. Tucker*, 364 U.S. 479, 486 (1960); *Louisiana ex rel. Gremillion v. N.A.A.C.P.*, 366 U.S. 293, 296 (1961); *N.A.A.C.P. v. Button*, 371 U.S. 415, 428-429 (1963); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 543 (1963); *Aptheker v. Secretary of State*, 378 U.S. 500, 518 (1964) (Black, J., concurring opinion); *United States v. Robel*, 389 U.S. 258, 263, n. 7 (1967); *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968); *Baird v. State Bar of Arizona*, 401 U.S. 1, 6 (1971).

> [F]irst Amendment rights are beyond abridgement either by legislation that directly restrains their exercise or by suppression or impairment through harassment, humiliation or exposure by government. One of those rights, freedom of assembly, includes, of course, freedom of association; and it is entitled to no less protection than any other First Amendment right as *N.A.A.C.P. v. Alabama,* 357 U.S. 449, at 460, and *Dejonge v. Oregon,* 299 U.S. 353, at 363, hold. These are principles applicable to all people under our Constitution irrespective of their race, color, politics or religion.

The right to freedom of association has been deemed so fundamental by the Court that State encroachment thereon has been protected by the due process clause of the Fourteenth Amendment.[23] [See, e.g., *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 460-461 (1958); *Louisiana ex rel. Gremillion v. N.A.A.C.P.,* 366 U.S. 293, 296 (1961); *N.A.A.C.P. v. Button,* 371 U.S. 415, 428-429 (1963); *Gibson v. Florida Legislative Investigation Committee,* 372 U.S. 539, 543 (1963).]

In *Williams v. Rhodes, supra,* the Court considered a challenge to Ohio's election laws; those laws made it virtually impossible for a new political party (even though it had hundreds of thousands of members), or an old party, to be placed on state ballots to choose electors pledged to particular Presidential and Vice-Presidential candidates. The plaintiffs in that case challenged the Ohio laws as being violative of equal protection, particularly insofar as those laws impinged upon the fundamental rights to vote and to associate. The Court agreed:

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[23]Similarly, therefore, the Fifth Amendment—as well as the First and Ninth Amendments—would protect individuals from Federal encroachment on their associational rights. Cf. *United States v. Tarlowski,* 305 F. Supp. 112, 121 (E.D. N.Y. 1969).

> In the present situation the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States. [393 U.S., at 30-31]

As a result of the impingement on plaintiffs' association rights (as well as the right to vote), the defendants could only uphold the discriminatory laws by showing that they promoted a compelling governmental interest. [*Id.*]

Although the above-cited decisions have guaranteed persons' freedom of association in the context of political and social expression, this inalienable freedom has been constitutionally protected in other contexts as well. Thus, similar to the appellees in this case, the First Amendment has guaranteed people's rights to join together in order to improve their economic plight. The First Amendment, therefore, has protected people's rights to join a union and to participate in its activities. As the Supreme Court stated: "The Constitution protects the associational rights of the members of the union, precisely as it does those of the N.A.A.C.P."[24] [*Brother-*

[24] In *McLaughlin v. Tilendis*, 398 F.2d 287, 289 (7th Cir. 1968), the Seventh Circuit stated that "[u]nless there is some illegal intent, an individual's right to form and join a union is protected by the First Amendment [citing, *inter alia*, *Thomas v. Collins*, 323 U.S. 516, 534 (1945); *Hague v. C.I.O.*, 307 U.S. 496, 512, 519, 523-524 (1939); *Griswold v. Connecticut*, 381 U.S. 479, 483

hood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1, 8 (1964); see, also *United Mine Workers v. Illinois State Bar Association,* 389 U.S. 217 (1967); *United Transportation Union v. State Bar of Michigan,* 401 U.S. 576 (1971).

If membership in a labor union, to improve one's economic status, is Constitutionally protected, then indigents' rights to membership in a household, for the economic necessity of preserving meager resources, should also be Constitutionally protected by the guarantee of freedom of association. Certainly laborers' and professionals' rights, to join together for economic purposes, are no more sacred than poor people's rights to do the same. Consequently, the impoverished appellees' right to live with persons unrelated to them, to protect against severe economic hardship, is protected by the First Amendment.

(1965)]." Consequently, the Circuit Court held that:

> Teachers have the right of free association, and unjustified interference with teachers' associational freedom violates the Due Process Clause of the Fourteenth Amendment. [398 F.2d, at 288]

Similarly in *Atkins v. City of Charlotte*, 296 F. Supp. 1068, 1075 (W.D.N.C. 1969), the District Court said:

> The Supreme Court of the United States has accorded freedom of association full status as an aspect of liberty protected by the Due Process Clause of the Fourteenth Amendment and by the rights of free speech and peaceful assembly explicitly set out in the First Amendment.

Consequently, the Court held:

> Our ultimate conclusion: That the firemen of the City of Charlotte are granted the right of free association by the First and Fourteenth Amendments of the United States Constitution; that the right of association includes the right to form and join a labor union whether local or national . . . [296 F. Supp., at 1077]

More recently, the Court has made it evidently clear that the fundamental right to freedom of association extends to personal, as well as political-economic, relationships.[25] In *Griswold v. Connecticut*, 381 U.S. 479 (1965), wherein married persons' right to use contraceptives was protected, the Court indicated that the personal right to freedom of association emanates from, and is penumbral to, the First Amendment. The Court stated:

> The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. [citing *Poe v. Ullman*, 367 U.S. 497, 516-522 (1961) (dissenting opinion)] Various guarantees create zones of privacy. *The right of association contained in the penumbra of the First Amendment is one.* [381 U.S., at 483-484] (emphasis added)

The associational right protected by the Court in *Griswold* was marriage. The Court noted that:

> Marriage is a coming together for better or for worse .... It is an *association* that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.

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[25] In an article in the Yale Law Journal, Professor Thomas Emerson persuasively argued that personal associations, of the sort here under consideration, are more appropriate objects of the First Amendment's protections than the political-economic associations traditionally safeguarded:

> [I]n situations where the government undertakes to prohibit personal associations, a doctrine of "the right of association" comes closest to providing a useful tool for decision. . . . The reason is that in this situation—an official proscription of personal association—the right to associate in its literal meaning comes nearest to being an absolute right, untouchable by government power. [Emerson, "Freedom of Association and Freedom of Expression," 74 Yale L.J. 1, 20, (1964)]

> Yet it is an *association* for as noble a purpose as any involved in our prior decisions. [381 U.S., at 486] (emphasis added)

That associations, involving relationships other than marriage, are also protected by the Court is clear from a recent analogous decision safeguarding unmarried persons' right to contraceptives. In *Eisenstadt v. Baird,* 405 U.S. 438 (1972), the Court held that the protection accorded in *Griswold* to married couples is equally applicable to unmarried couples. The Court said:

> If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. [405 U.S., at 453]

More recently, and more directly on point, is the Court's discussion of *Boddie v. Connecticut,* 401 U.S. 371 (1971), in *United States v. Kras,* 41 U.S.L.W. 4117 (U.S., Jan. 10, 1973). In that case, Justice Blackmun, writing for the Court, reasoned why the assessment of filing fees on indigent potential litigants–thereby frequently making it impossible for them to initiate legal proceedings–was constitutionally permissible in bankruptcy cases (the subject matter in *Kras*) but not in divorce actions (the subject matter in *Boddie*). As one of the major grounds for distinguishing the two legal proceedings, the Court noted that divorce actions touch upon individuals' freedom of association, while bankruptcy proceedings do not involve such fundamental rights. Consequently, the equal protection argument raised in *Boddie* was more strictly scrutinized than the equal protection claim in *Kras.* The Court stated:

> The appellants in *Boddie,* on the one hand, and Robert Kras, on the other, stand in materially different postures. The denial of access to the

judicial forum in *Boddie* touched directly, as has been noted, on the marital relationship *and on the associational interests that surround the establishment and dissolution of that relationship. On many occasions we have recognized the fundamental importance of these interests under our Constitution.* See, for example, *Loving v. Virginia,* 388 U.S. 1 (1967); *Skinner v. Oklahoma,* 316 U.S. 535 (1942); *Griswold v. Connecticut,* 381 U.S. 479 (1965); *Eisenstadt v. Baird,* 405 U.S. 438 (1972); *Meyer v. Nebraska,* 262 U.S. 390 (1923). The *Boddie* appellants' inability to dissolve their marriages seriously impaired *their freedom to pursue other protected associational activities.* Kras' alleged interest in the elimination of his debt burden, and in obtaining his desired new start in life, although important and so recognized by the enactment of the Bankruptcy Act, does not rise to the same constitutional level.[26] [41 U.S.L.W., at 4121] (emphasis added)

Similarly appellees' personal and fundamental right, to freely and lawfully associate with whomever they wish in the confines of their own homes, must receive this Court's most vigilant protection. If freedom of association is to retain its Constitutional vitality, it most assuredly must be protected in the instant situation.

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[26]See, also, *Mindel v. United States Civil Service Commission,* 312 F. Supp. 485 (N.D. Calif. 1970), where the District Court held that it is constitutionally impermissible to remove a postal clerk from his job just because he lives with a woman to whom he is not married.

D. Appellees' Lawful Associational Activities, in the Sanctity of Their Homes, Are Constitutionally Protected From Governmental Invasion.

Fundamental to a democratic society and the Constitution is the privacy right of people, when engaged in lawful activity, to be secure in their homes from governmental invasion. That this personal right of privacy is most important to, and an integral part of, a democratic society was carefully explained by Professor Emerson:

> The concept of limited government has always included the idea that governmental powers stop short of certain intrusions into the personal life of the citizen. This is indeed one of the basic distinctions between absolute and limited government. Ultimate and pervasive control of the individual, in all aspects of his life, is the hallmark of the absolute state. In contrast, a system of limited government safeguards a private sector, which belongs to the individual, firmly distinguishing it from the public sector, which the state can control. Protection of this private sector—protection, in other words, of the dignity and integrity of the individual—has become increasingly important as modern society has developed. All the forces of a technological age, industrialization, urbanization, and organization—operate to narrow the area of privacy and facilitate intrusions into it. In modern terms the capacity to maintain and support this enclave of private life marks the difference between a democratic and a totalitarian society. [Emerson, "Nine Justices in Search of a Doctrine," 64 Mich. L. Rev. 219, 229 (1965)]

Due to this fundamental aspect of a democratic society, the Court has vigilantly protected individuals' privacy

rights in the confines of their homes. Under the rubric of the right to privacy, the home traditionally has had an exalted place in our Constitutional framework and, therefore, has remained inviolate from governmental interference. The special status of the home as the primary locus of the right to privacy is supported by a venerable legal tradition. In *Miller v. United States*, 357 U.S. 301 (1958), the Court drew upon this tradition:

> From earliest days, the common law drastically limited the authority of law officers to break the door of a house to effect an arrest. Such action invades the precious interest of privacy summed up in the ancient adage that a man's house is his castle. As early as the 13th Yearbook of Edward IV (1461-1483), at folio 9, there is a recorded holding that it was unlawful for the sheriff to break the doors of a man's house to arrest him in a civil suit in debt or trespass, for the arrest was then only for the private interest of a party. Remarks attributed to William Pitt, Earl of Chatham, on the occasion of debate in Parliament on the searches, incident to the enforcement of an excise on cider, eloquently expressed the principle: "The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his forces dare not cross the threshold of the ruined tenement."[27] [357 U.S., at 306-307]

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[27] In *Stanley v. Georgia*, 394 U.S. 557, 564 (1969), and in *Eisenstadt v. Baird*, 405 U.S. 438, 453-454, n. 10 (1972), the Court stated:

> [A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusion into one's privacy.

Although one's privacy rights–to be safeguarded from governmental interference (particularly while engaged in lawful conduct that is neither anti-social nor immoral) in the sanctity of one's home–are not specifically articulated in the Bill of Rights, they are clearly protected by the Constitution. The traditional sanctity of the home has been accorded scrupulous protection by the Constitution through various provisions in the Bill of Rights. As the Court recognized in *Griswold v. Connecticut*, 381 U.S. 479 (1965), the right to privacy, particularly in the home, is penumbral to the First, Third, Fourth, Fifth and Ninth Amendments:

> Various guarantees create zones of privacy. The right to association contained in the penumbra of the First Amendment is one .... The Third Amendment in its prohibition against the quartering of soldiers "*in any house*" ... is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their *persons, houses, papers and effects*, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone–the most comprehensive of rights and the right most valued by civilized man." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting)

See *Griswold v. Connecticut, supra*; cf. *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 462 (1958).

detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." [381 U.S. at 484] (emphasis added)

The *Griswold* decision, however, was not the first or only indication that the right to privacy (particularly in the confines of one's home) is penumbral to the Bill of Rights. Thus, the right to privacy was pertinent in protecting individuals' rights in several First Amendment cases. See, e.g., *Stanley v. Georgia,* 394 U.S. 557 (1969), where the right to possess obscene materials in the privacy of one's home was protected[28] [see, also, *United States v. Dellapia,* 433 F.2d 1252, 1255-1257 (2d Cir. 1970)]; *Gibson v. Florida Legislative Investigation Committee,* 372 U.S. 539 (1963), and *N.A.A.C.P. v. Alabama,* 357 U.S. 449 (1958), where the rights to "privacy in one's associations" [357 U.S., at 462] were protected by preventing the States of Florida and Alabama from obtaining the names of members in a civil rights organization. Cf. *Breard v. Alexandria,* 341 U.S. 622 (1951), where the Court protected individuals from unsolicited canvassing at their homes.

It is also clear that the underlying basis of the Third and Fourth Amendments, by their explicit terms, is the right to privacy and the sanctity of the home. Thus, in *Mapp v. Ohio,* 367 U.S. 643 (1961), which applied the

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[28] In *Stanley v. Georgia, supra,* the Court held:

Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the *privacy of one's own home.* If the First Amendment means anything, it means that a State has no business telling a man, *sitting alone in his own house,* what books he may read or what films he may watch. [394 U.S., at 565] (emphasis added)

exclusionary rule to an unlawful search, the Court said that it was protecting a "right to privacy, no less important than any other right carefully and particularly reserved to the people." [367 U.S., at 656] In *Boyd v. United States,* 116 U.S. 616 (1886), the Court referred to the Fourth and Fifth Amendments as protecting a person's security and liberty in the confines of his home. The Court, also, indicated how fundamental those rights are:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the Court . . . .; they apply to all invasions on the part of the government and its employees, *of the sanctity of a man's home and the privacies of life.* It is not the breaking of his doors and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense . . .[29] [116 U.S., at 630] (emphasis added)

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[29] Prior to *Boyd,* in *Kibourn v. Thompson,* 103 U.S. 168, 195 (1880), Justice Miller held for the Court that neither House of Congress "possesses the general power of making inquiry into the private affairs of the citizen." Justice Field later commented about *Kibourn*: "This case will stand for all time as a bulwark against the invasion of the right of the citizen to protection in his private affairs against the unlimited scrutiny of investigation by a Congressional committee." *In re Pacific Ry. Commission,* 32 F. 241, 253 (9th Cir. 1887) [cited with approval in *Sinclair v. United States,* 279 U.S. 263, 292 (1929)] Justice Harlan, also speaking for the Court, indicated that the same principle applies to administrative inquiries, indicating that the Constitution prohibited a "general power of making inquiry into the private affairs of the citizen." *Interstate Commerce Commission v. Brimson,* 154 U.S. 447, 478 (1894).

In *Miller v. United States,* 357 U.S. 301 (1958), where law officers broke down a door to enter a defendants' home, the Court said:

> Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house. [357 U.S., at 313]

See, also, *In re Labady,* 326 F. Supp. 924 (S.D.N.Y. 1971), wherein District Judge Mansfield held that a homosexual man could not be denied naturalization for failure to demonstrate "good moral character" [8 U.S.C. §1427(a)]—despite the District Court's "general 'revulsion' or 'moral conviction or instinctive feeling' against homosexuality" [326 F. Supp., at 927]—because the petitioner conducted his homosexual activities behind locked doors in his hotel room, thereby protecting his privacy rights from governmental interference. [*Id.*, at 926-928]

Very recently, the Court indicated that individual's rights to privacy can be founded in the concept of personal liberty contained in the due process clause. In *Roe v. Wade,* 41 U.S.L.W. 4213 (U.S., Jan. 22, 1973), the recent decision protecting women's rights to abortions, the Court clearly stated that fundamental personal rights—such as the ones here at issue—are constitutionally protected under the rubric of the right to privacy. Justice Blackmun, writing for the Court, stated:

> The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford,* 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts the

Court or individual Justices have indeed found at least the roots of that right in the First Amendment, *Stanley v. Georgia,* 394 U.S. 557, 564 (1969); in the Fourth and Fifth Amendments, *Terry v. Ohio,* 392 U.S. 1, 8-9 (1968), *Katz v. United States,* 389 U.S. 347, 350 (1967), *Boyd v. United States,* 116 U.S. 616 (1886), see *Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, *Griswold v. Connecticut,* 381 U.S. 479, 484-485 (1965); in the Ninth Amendment, *id.,* at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923). These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," *Palko v. Connecticut,* 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving v. Virginia,* 388 U.S. 1, 12 (1967), procreation, *Skinner v. Oklahoma,* 316 U.S. 535, 541-542 (1942), contraception, *Eisenstadt v. Baird,* 405 U.S. 438, 453-454 (1972); *id.,* at 460, 463-465 (White, J., concurring), family relationships, *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944), and child rearing and education, *Pierce v. Society of Sisters,* 268 U.S. 510, 535 (1925), *Meyer v. Nebraska, supra.* [41 U.S.L.W., at 4225]

Certainly appellees' rights to privacy—to associate in their homes with unrelated peopel—is fundamental and implicit in the concept of personal liberty. If the Constitution protects individuals' privacy rights: to obtain and use obscene materials in the home [*Stanley v. Georgia, supra*]; to associate with others to effectuate political purposes [*N.A.A.C.P. v. Alabama, supra* and

Gibson v. Florida Legislative Investigation Committee, supra]; to get married [*Loving v. Virginia, supra*]; to use contraceptives in the home [*Griswold v. Connecticut, supra* and *Eisenstadt v. Baird, supra*]; to procreate [*Skinner v. Oklahoma, supra*]; to engage in homosexual acts in a hotel room [*In re Labady, supra*]; to get an abortion [*Roe v. Wade, supra*]; and to have security in the home from unwarranted governmental intrusion even after having committed a crime [*Mapp v. Ohio, supra*], then most assuredly the appellees are Constitutionally protected from governmental intrusion when they live together with unrelated people. This is particularly true where, as here, the association in the home is continued lawfully and peaceably and without the taint of any anti-social activity.

That this right to privacy extends to the relationship of unrelated individuals is manifestly clear from two very recent decisions. In *Eisenstadt v. Baird, supra,* the Court granted a writ of *habeas corpus* to a petitioner who had been jailed because he provided contraceptives to an unmarried woman. After holding that the petitioner had standing to raise the privacy rights of the unmarried woman [405 U.S., at 443-446], the Court turned to the substantive claims. The Court held that the right to privacy of unmarried individuals is just as sacrosanct as the privacy right of married couples:

> If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up. If the right of

> privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child [405 U.S., at 453]

Similarly in *United States v. Kras, supra,* Justice Blackmun, for the Court, explained that the decision in *Boddie v. Connecticut,* 401 U.S. 371 (1971)–prohibiting the imposition of filing fees on indigents when they seek to initiate divorce proceedings–touched directly "on the marital relationship and on *the associational interests that surround* the establishment and *dissolution of that relationship.*" [41 U.S.L.W., at 4121] (emphasis added). Justice Blackmun concluded that the "*Boddie* appellants' inability to dissolve their marriage seriously *impaired their freedom to pursue other protected associational activities.*"[30] [*Id.*] (emphasis added) Similarly here, the right to privacy extends to the associational activities of unrelated persons in the confines of their homes–many, if not most, of whom have gotten together solely as a result of severe economic hardship.

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[30] Similarly in *Mindel v. United States Civil Service Commission,* 312 F. Supp. 485 (N.D. Calif. 1970), the District Court ruled on the privacy rights of an unmarried couple. In that case, the plaintiff was fired from his job as a postal clerk because he lived with a woman to whom he was not married. The Court held that the firing of the plaintiff constituted a violation of his privacy rights and ordered that he be reassigned to his job. In so doing, the Court, citing *Griswold,* said that "even in cases where it [the government] has a legitimate interest, it may not invade 'the sancity of a man's home and the privacies of life.' " [312 F. Supp., at 488] Cf. *Norton v. Macy,* 417 F.2d 1161, 1164 (D.C. Cir. 1969).

E. No Compelling Governmental Interest Is Actually Promoted by the Discriminatory Unrelated Household Provision in the Food Stamp Act.

Only two asserted purposes are allegedly served by the discriminatory unrelated household provision in the Food Stamp Act [7 U.S.C. §2012(e)]: (1) the elimination of food stamp aid from so-called "hippy" households; and (2) the prevention of fraud and other Program abuses. [Appellants' Brief, at 14-15] As for the first purpose, it is clear that the Government may not discriminate against so-called "hippies", even if that category of persons could be defined with reasonable precision[31]; persons cannot be discriminated against on the basis of length of hair or any other personal attribute that is unrelated to the relevant statute's, or Program's, purposes.[32] At any rate, it is obvious that discriminating against "hippies" is not a "compelling governmental interest." Moreover, the undis-

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[31] See *Parr v. Municipal Court*, 3 Cal. 3d 861, 92 Cal. Rptr. 153, 479 P.2d 353 (1971), where the California Supreme Court struck down an ordinance directed against so-called "hippies".

[32] That persons cannot be discriminated against based on personal attributes that are unrelated to a program's purposes is clear. See *Reed v. Reed*, 404 U.S. 71 (1971) and *Stanley v. Illinois*, 405 U.S. 645 (1972)–discrimination on the basis of sex; *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), *Korematsu v. United States*, 323 U.S. 214 (1944) and *Graham v. Richardson*, 403 U.S. 365 (1971)–discrimination on the basis of nationality; *Levy v. Louisiana*, 391 U.S. 68 (1968) and *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972)–discrimination on the basis of illegitimacy; *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966)–discrimination on the basis of wealth; *Brown v. Board of Education*, 347 U.S. 483 (1954)–discrimination on the basis of race; *Schneider v. Rusk*, 377 U.S. 163 (1964)–discrimination on the basis of alienage.

puted evidence before this Court indicates that it is not the "hippies" who are hurt by the unrelated household provision, it is the poorest of the poor who are most harmfully affected—those persons and families who must double up to pay for rent and other necessities, unemployed persons and migrants. [See Appendix, at 43]

Although the alleged second purpose of the provision—the prevention of fraud and other possible Program abuses—is important, that purpose is not reasonably promoted by the unrelated household provision. Since the unrelated household provision impinges on fundamental Constitutional rights, it does not reasonably or permissibly promote the purpose of Program abuse prevention because: (1) it is improperly tailored for that objective, being unreasonably overly and underly broad[33]; and (2) there are significant alternative methods that can be utilized to accomplish the alleged statutory purpose.[34]

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[33]If discriminatory enactments impinge on fundamental rights, such laws can only withstand Constitutional scrutiny if they are properly tailored to actually promote a compelling governmental interest; they cannot be overly or underly broad in promoting those objectives: [See, e.g., *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 101 (1972); *Williams v. Rhodes*, 393 U.S. 23, 32-34 (1968); *Dunn v. Blumstein*, 405 U.S. 330, 343, 351-352 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969); *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972).]

[34]Governmental action that impinges on fundamental rights will not survive judicial scrutiny if there are alternative means available to achieve the alleged compelling governmental interests. [See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 353-354 (1972); *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 101, n. 8 (1972). See, also, *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Schneider v. State*, 308 U.S. 147, 164 (1939); *Harman v. Forssenius*, 380 U.S. 528, 543 (1965).]

That the provision is overly and underly broad is manifestly clear. Nothing in the nature of households composed of families together with unrelated persons, or several unrelated people living together, has anything to do with the perpetration of fraud or any other Program abuses. Affluent persons inclined to cheat in a poor people's program are as likely to be found in single family households as they are in unrelated households. No evidence has or can be found that Program abuses are more likely to occur, let alone only occur, in unrelated households. To the contrary. The undisputed evidence in this case demonstrates that unrelated households are usually more needy; and that ineligible, non-needy persons—who seek to wrongfully benefit from the Government's food relief to the poor—will try to defraud the Program without regard to whether they live in a single family, or an unrelated, household. [See Appendix, at 43]

Moreover, alternative methods for preventing Program abuse are available to the Government. Indeed, as in *Dunn v. Blumstein*, 405 U.S. 330, 353-354 (1972), the relevant statutory scheme already contains a provision to prevent fraud. Pursuant to sections 14(b) and 14(c) of the Food Stamp Act [7 U.S.C. §§2023(b) and (c)], there are strict penalties exacted against perpetrators of food stamp fraud. The provisions state:

> (b) Whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization to purchase cards in any manner not authorized by this Act or the regulations issued pursuant to this Act shall, if such coupons or authorization to purchase cards are of the value of $100 or more, be guilty of a felony and shall, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years or both, or, if such coupons or

authorization to purchase cards are of a value of less than $100, shall be guilty of a misdemeanor and shall upon conviction thereof, be fined not more than $5000 or imprisoned for not more than one year, or both.

(c) Whoever presents, or causes to be presented, coupons for payment or redemption of the value of $100 or more, knowing the same to have been received, transferred, or used in any manner in violation of the provisions in this Act or the regulations issued pursuant to the Act, shall be guilty of a felony and shall, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years or both, or, if such coupons are of a value less than $100, shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not more than $5,000 or imprisoned for not more than one year, or both.

In addition to the criminal sanctions against fraud, the Food Stamp Act unequivocally requires that all able-bodied persons between the ages of 18 and 65, with very limited exceptions, must register for, and accept, work that may be offered to them. [7 U.S.C. §2014(c)]

In short, the unrelated household provision—which so harmfully impinges on poor people's rights to association and privacy, and which causes many of the poorest of the poor to lose their only access to nutritional adequacy—is not necessary or reasonably suited to promote any compelling governmental interest. The provision defeats the clearly articulated purposes of the Program [7 U.S.C. §2011] and unconstitutionally tramples upon the impoverished appellees' fundamental rights. Consequently, the unrelated household provision in the Food Stamp Act [7 U.S.C. §2012(e)] violates appellees' rights to equal protection, as protected by the Fifth Amendment to the Constitution.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

RONALD F. POLLACK
ROGER A. SCHWARTZ
NLSP Center on Social Welfare
Policy and Law, Inc.
25 West 43rd Street
New York, N.Y. 10036
(212)354-7670

Attorneys for Appellees

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACINTA MORENO, et al.,	:	
Plaintiffs,	:	
v.	:	Civil Action
	:	No. 615-72
DEPARTMENT OF AGRICULTURE, et al.,	:	
Defendants.	:	

Washington, D.C., April 5, 1972

BEFORE THE HONORABLE JOHN LEWIS SMITH, JR., United States District Court Judge, Motion for a Temporary Restraining Order.

APPEARANCES:

RONALD F. POLLACK, Esq., M.B. TRISTER, Esq., and ROGER A. SCHWARTZ, Esq., for the Plaintiffs.

PETER J.P. BRICKFIELD, Esq., for the Government.

[2] PROCEEDINGS

MR. BRICKFIELD: If it please the Court, we are here, of course, on a question of a temporary restraining order as opposed to a final determination on the merits.

It has often been held that there are four grounds to be considered for a granting of preliminary relief and the leading case, of course, is the Virginia Petroleum Jobbers case and these four grounds were reaffirmed quite recently by this Circuit in the Delaware and Hudson Railway case in 1971.

These, of course, are concerned with the consideration of the probability of success on the merits, the question

of irreparable injury, as opposing counsel has stated, the question of preservation of the status quo and the question of balancing the interests and equities.

We propose to treat these issues seriatim. We do contend that the Court is without jurisdiction.

We are aware that there have been cases in which the District Courts have assumed jurisdiction and in the Hernandez case referred to by Plaintiffs, the Court did assume jurisdiction and that case, however, was dismissed as moot and the three judge court did not consider this particular matter.

[3] In a very recent case, the Second Circuit in Rizzo versus Kirby, 453 Fed. 2d, in a case questioning the distribution of food stamps for poor people, although admittedly they were not federal defendants there, but the Court declined jurisdiction holding that under 1331 and 1337 of the Judicial Code, the Plaintiffs could not compile their claims, to aggregate their claims, to reach the $10,000 jurisdictional amount.

Concerning the invasion of privacy, we are not concerned here with the criminal question as in Mapp versus Ohio or certain other cases concerning possession of obscene literature.

We have no criminal penalities for these people. It is merely a question of the constitution of their household.

We have no physical invasion here as we had in that case.

The Department of Agriculture is not going into these homes. They are not having unlawful and unwarranted searches and seizures.

Taking the two cases that Plaintiffs refer to, Mindel, the case of the post office worker, and as the Court knows the only grounds for removal of a federal official with tenure is for the efficiency of the service.

Mr. Mindel was charged with immoral conduct and we [4] submit that the true rationale of that case in this day and age, a man living with a woman without the benefit of marriage, perhaps does not constitute, at least in some quarters, immoral conduct.

In the Eisenstadt case, we have once again a criminal matter, the distribution of contraceptives which the courts always have considered to be much more restrictive than civil respect.

On the question of privacy and the right to associate, we have not nor do we question the morality of the Plaintiffs.

For a close comparison, I am reminded of the Internal Revenue Code of two young people that get different tax benefits, advantages, by being married than by being not married. This is not, we feel, a question of an invasion of privacy.

The Congress has, in the Internal Revenue Code, determined that young people, being given the benefit of marriage, are paying certain rates and those without marriage are paying other rates.

THE COURT: Are you familiar with the man in the house rule for welfare payments?

MR. BRICKFIELD: Yes, Your Honor.

THE COURT: What comment do you want to make on that?

MR. BRICKFIELD: I do not feel that that is [5] particularly applicable in this case.

We have a question where Congress has taken a benefit, the food stamp benefit, and they have given these benefits to certain citizens and in the Dandridge case in the State of Maryland where the question was the extent of benefits, the Supreme Court held that it matters not whether Congress solves the whole problem, but merely that Congress attempts to solve the problem and goes just

so far in solving the problem that the statute should not be stricken down.

THE COURT: What is the purpose of the Food Stamp Act?

MR. BRICKFIELD: To alleviate malnutrition and hunger amongst certain groups.

Now, there are economic limits on who is eligible and certainly it would be a difficult question to say a person making $1 a month more than the limit Congress has put on it should not get food stamps or should get food stamps.

A limit must be put on it. The resources of Congress are final and in this day and age–

THE COURT: This is not a question of limit as to monetary benefit. It is the question of relationship, is it not?

MR. BRICKFIELD: Yes, it is.

THE COURT: How is the regulation rationally related [6] to the Act?

MR. BRICKFIELD: Your Honor–

THE COURT: The purposes of the Act?

MR. BRICKFIELD: It is rational to the extent that the Act goes so far and no farther. It is a question of Congress stopping after giving so many people so much benefit and what we feel Plaintiffs are complaining of here, they did not get in and they are not included and admittedly, some Plaintiffs were included previously, but Congress just has not gone quite that far, and I think Congress can choose how far to go and how far not to go in granting benefits of this nature.

Until recently Puerto Rico did not receive equal–did not receive social security benefits. There are certain social security benefits that the citizens of Puerto Rico do not receive and this was challenged quite recently

and it is on appeal before the First Circuit, the question of whether this was a denial of equal protection to the residents of Puerto Rico to deny them social security benefits.

The District Court answered in the affirmative and said it was not a denial of equal protection.

I don't think Congress has to give food stamps to everyone. I think they can be allowed to give them to whom they want.

THE COURT: On some rational basis?

[7] MR. BRICKFIELD: Yes.

THE COURT: There is no monetary consideration here, but I was thinking of my own situation. Fortunately I am not an applicant for food stamp benefit, but I have living with me in my home a young man, unemployed, working on an intern project.

Do you mean I would not be entitled to benefits if I required them?

MR. BRICKFIELD: If you met the other eligibility requirements, yes, Your Honor.

THE COURT: Why? For what reason?

MR. BRICKFIELD: Because Congress has deemed—you would be if the young man was not with you. If the young man established his own residence and became his own household, you would be eligible, but Congress has determined that people without a certain degree of relationships are not those that they chose to give these benefits to.

THE COURT: Let's get back to the four requirements. Where is the irreparable injury to the government if the temproary restraining order is granted?

MR. BRICKFIELD: We feel that the only relief that the Court can give, vis-a-vis the statute, is to strike down the Food Stamp Act as amended.

Accordingly, no one at that juncture will get food [8] stamps. Congress has not authorized expenditures or appropriated money to give food stamps to these Plaintiffs.

Taking the question of the regulation as most favorable to Plaintiffs, as Mr. Pollack has stated, there are in each household at least one person that the statute clearly has not made eligible.

THE COURT: Now, the Hejny family was receiving benefits up until March, were they not?

MR. BRICKFIELD: I have no information. I do not contest that at this point, but I have no information concerning that.

The food stamp program is administered by the local agencies and the Department of Agriculture does not directly deal with the people, but assuming they were, Your Honor, if—this Court cannot order benefits of the young lady Sharon who is living with the Hejny family because Congress has not appropriated the money.

What the Court can do is say no one gets food stamps until Congress changes their mind or passes a constitutional law if the Court feels that law is unconstitutional.

We do feel that the status quo also, Your Honor, is the situation with the Act and the regulations in effect, and this must be maintained.

[9] That pertains to these individual Plaintiffs because the status quo is that they are not getting food stamps in the class action, if this becomes a class action, for people that Plaintiffs represent who are mostly people who are not getting food stamps.

Accordingly, Your Honor, the status quo to be preserved is one with the regulations as they are currently in effect.

This Act has been passed for over a year.

THE COURT: It has been implemented only in recent months, has it not?

MR. BRICKFIELD: Yes, it has, Your Honor.

THE COURT: In other words, if counsel is correct, it was just last month that the Hejny family was denied benefits?

MR. BRICKFIELD: Yes, sir, but they are also not receiving benefits and if we maintain the status quo, we would maintain them without benefits, Your Honor, and in this Circuit, the Supreme Court said that is the only reason for a temporary restraining order.

In the St. Louis and Western Railroad, the Supreme Court held in a case very similar to this where a statute was attacked, a District Court judge granted a temporary restraining order which did not preserve the status quo and the Supreme Court stated that was the only grounds that the temporary [10] restraining order could be granted pending the convening of a three judge court.

THE COURT: Very well.

MR. BRICKFIELD: If I may make one additional comment, Your Honor?

THE COURT: Yes.

MR. BRICKFIELD: We further feel that the statute and regulations are not in conflict.

Household is defined in several ways in the statute. It is defined as people who are related and is further defined as a particular individual.

Taking the case of any of the Plaintiffs and perhaps the Hejny's, the question would be, who is the household? Is it the Hejny's or Sharon? She could become a household in and of herself and would she not qualify as a household and should the Hejny's be disqualified?

In the case of Mr. Durant, you have the gentleman living with another male friend and they are receiving,

and I believe one is going to college, and taking Plaintiffs construction it is impossible to determine which one of these two people constitutes the household.

The household constitutes a group of related people. There is on one group of related people in any of these households [11] which share the common cooking facilities, prepared their food in common, purchase their food in common.

There is one group that fits that definition of a household, being all related people and in the Hejny situation, they are not all related people who are preparing and obtaining their food in common and so there is no household and it is this group of people we feel that constitutes the ineligible people within the intent of Congress and referring to the letter by the six Senators, I really do think it is irrelevant.

I do not think there is any decision that holds that a subsequent pronouncement of a Congressman or two or a Senator or two can affect as amendment in legislation. The legislation is what is there and not what a Congressman or a Senator or Senators thinks was at a later date.

The consideration of the legislative history, we contend, are the contemporary—the previous considerations, what was on the mind of the Congress when they passed a particular statute and not at a later date.

If this was the contention of the Senators they could have, of course, taking the floor and the floor was open and admittedly, the Senate passed it, I believe, on the 31st of December and it was late in the evening, but they still could have made their particular thoughts known.

[12] Lastly, we feel that this would grant Plaintiffs the ultimate relief they seek preliminarily.

Conceded, arguendo, the Plaintiffs are a needy people but to give benefits to the people that Plaintiffs counsel lists as being in the thousands would certainly be at great cost.

As this Circuit said in the Delaware and Hudson Railroad case just last year, the question in preserving the status quo and in balancing the equities is that you must consider the question of a valid bond.

There they were involved with a $1,000.00 bond concerning a railroad strike and they held that was impossible to adequately compensate the parties.

Here we are—the Plaintiffs are needy. They have no monetary means to provide a bond. To give them the food stamp now would be granting them ultimate relief preliminarily which we do not feel should be given at a hearing on a temporary restraining order.

The Congress in passing the three judge court statute fully contemplated that any decision on preliminary relief would be taken at a full hearing by three judges. They have shown that great reluctance should be given when this extraordinary relief is prayed for.

We feel certainly in a case where Plaintiffs are [13] getting the ultimate relief preliminarily, the Court should exercise restraint.

Thank you, Your Honor.

THE COURT: Very well.

This record is certified by the undersigned to be the official transcript of the above-entitled proceedings.

/s/ Dawn T. Copeland

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACINTA MORENO, et al.,	:	
Plaintiffs,	:	Civil Action
v.	:	No. 615-72
	:	
DEPARTMENT OF AGRICULTURE, et al.,	:	
Defendants.	:	

Washington, D.C., April 14, 1972

BEFORE THE HONORABLE CARL McGOWAN, Circuit Judge, THE HONORABLES JOHN LEWIS SMITH, Jr., and AUBREY E. ROBINSON, Jr., United States District Court Judges.

APPEARANCES:

RONALD F. POLLACK, Esq., JOHN R. KRAMER, Esq., and ROGER A. SCHWARTZ, Esq., for the Plaintiffs.

PETER BRICKFIELD, Esq., JOHN HARRIS, Esq., and ROBERT LOWREY, Esq., for the Defendants.

PROCEEDINGS

JUDGE McGOWAN: You may proceed.

MR. BRICKFIELD: May it please the Court, initially–

JUDGE McGOWAN: Before we forget it, are you prepared to have the case decided on the merits now or do you want to preserve that question?

MR. BRICKFIELD: Your Honor, it is our contention that if this Court does not find a rational basis for the statute and yet it determines it does have jurisdiction, an

evidentiary hearing must be presented to determine if in fact there is a rational basis.

JUDGE McGOWAN: In other words, you are not–

MR. BRICKFIELD: We are not seeking the final determination here.

With a slightly red face, we would like to call the Court's attention to a typographical omission in the papers which were submitted at page 16.

We cite the case of Faraco versus Commissioner of Internal Revenue and through a typographical error, the citation of certiorari–

JUDGE McGOWAN: Let me interrupt you a minute.

You have made a motion for summary judgment in which you say there are no material issues of fact.

[16] MR. BRICKFIELD: Yes, but if the Court deems there are material issues of fact and we say there are no material issues of fact in that there is a rational basis for the statutory enactment and that the Act is constitutional, assuming jurisdiction, but if the Court determines within the legislative history of the Act, and we feel this is governed by the Chicago Mercantile Exchange versus Tieken case which we cite at page three of our brief, the Court in considering the constitutionality of the statute should consider the legislative history before the Congress and if the legislative history before the Congress shows a rational–shows and provides a rational basis and provides that the statute was constitutional, of course the Court should uphold this statute.

There is a strong presumption of constitutionality and if the Court determines that the legislative history is inadequate, does not provide that basis by which the Court can sustain the statute, we feel the Court would then look to the rationale of Flemming versus Nestor to see if there is any basis for sustaining of the constitutionality of the statute.

In Flemming, the Supreme Court stated that the Court should look far and wide for a basis for sustaining a statute before striking down a statute.

If I can just go back to the point that I started to [17] make, I feel constrained to make this and the case we did cite at page 16, typographically we omitted the citation of certiorari being denied at 359 U.S. at–

JUDGE McGOWAN: Which case is that? What is it referring to?

MR. BRICKFIELD: This would be our motion in support of our–in our memorandum of Points and Authorities for the motion to dismiss. It is about 8 or 9 pages from the back.

It is 359 U.S. 925.

JUDGE McGOWAN: Three what?

MR. BRICKFORD: 359 U.S. 925.

This Court has expressed a concern with a statutory–the basis of its jurisdiction. On the original question that Judge McGowan presented, we feel that this Court can at most consider the statutory–the constitutionality of the statute.

If this Court upholds the constitutionality of the statute, the case should be remanded to a single judge court for a determination of the applicability of the regulations and for that reason, in our memoranum of Points and Authorities, we did not address ourselves specifically to the regulations.

If this Court determines that the statute is unconstitutional, it is our contention that the only relief [18] that can be afforded is a striking down of the Food Stamp Act of 1964 as amended.

Congress has categorically provided relief to individuals, related individuals, who reside in households.

Congress has included only related individuals and those to whom it is granting relief, the judiciary cannot extend to a further group of people a congressional benefit.

The Congress only can expend the public funds. When Congress appropriated the money for the food stamp program, it has appropriated it only to those it specifically intended to benefit.

JUDGE McGOWAN: In other words, your claim is that if we find Section 3-A unconstitutional, the whole statute goes?

MR. BRICKFIELD: Yes, Your Honor.

This we feel is a substantial reason why a preliminary injunction should not issue because it certainly would not be in the public interest.

JUDGE McGOWAN: I would like you to go over that argument again.

MR. BRICKFIELD: In passing the Food Stamp Act, and the supporting appropriations, Congress authorized stamps to be distributed to households.

[19] The Food Stamp Act has operated on a household basis. If Congress—Congress defines household as being a group of related individuals and other definitions, but the one we are concerned with here is the related individuals and if in defining and providing relief only to related individuals, Congress has acted in an unconstitutional fashion, this Court can only strike down Congress' enactment and if, for example, Congress were to make a particular act a crime, a criminal violation, and that was determined by a court to be an unconstitutional determination, the Court could not then in and of itself say another thing will be a crime, something very similar.

When Congress has only said related people can get food stamps, the judicial section of the government cannot say, we want to give food stamps or we think stamps should be given to more than those that Congress has determined should be eligible.

Congress has expressed an intent not to give food stamps to certain groups. If they are wrong, no one should get them until Congress comes forward again and gives them to the proper groups.

We would like to incorporate our original memorandum in opposition to Plaintiffs' request for a temporary restraining order into our argument.

Would the Court want me to go into the jurisdiction [20] of the District Court?

JUDGE McGOWAN: I was looking at your second paper that was filed. I saw it for the first time this morning.

Your argument there seems much more limited than before.

Do you agree that 1361 gives the Court jurisdiction?

MR. BRICKFIELD: No, we don't, your Honor. We limited our second jurisdictional argument mainly to the points that are presented at the hearing on the temporary restraining order.

JUDGE McGOWAN: How do you handle the Peoples case?

MR. BRICKFIELD: Well, I would first initially give the distinction that the Peoples case concerned—was decided on, from the basis of the opinion, the prior statute which no longer governs the District Court.

It would seem to me that the gravamen of the Peoples case was an attack on the Secretary's regulation as being violative of the statutory provisions.

We do not feel that 1361 grants a court jurisdiction to consider the constitutionality of a statute.

With regard to Plaintiffs argument on the $10,000 jurisdictional amount, we would respectfully refer to the case of Rosado versus Wyman and wherein the court quoted from another case and stated, "it is firmly settled law that cases [21] involving rights not capable of valuation in money may not be heard in Federal Courts where the applicable jurisdictional statute requires that the matter at controversy exceed a certain number of dollars."

Plaintiffs' have stated that they do not contend that they received or will receive the $10,000 worth of food stamps or are owned $10,000 worth of food stamps. The key jurisdictional amount argument, the amount of injury or harm, the courts have uniformly stated that Congress has been aware of the incalculability of these rights and Congress being aware of this, chose not to change the statute, must be deemed to have approved that judicial interpretation.

With respect to the Markees case, which was in California, we would note–

JUDGE McGOWAN: Does that appear in the Federal Supplement?

MR. BRICKFIELD: No, it does not.

JUDGE McGOWAN: Is that a District Court case?

MR. BRICKFIELD: Yes, it is, Your Honor. I do not have the citation of that.

JUDGE McGOWAN: I think somebody should provide us with that.

MR. BRICKFIELD: We will provide it, Your Honor.

[22] I would like to note though that that case concerned an attack on the statutory provisions, and the regulations–the acts that were taken were not in accordance with the statutory provisions and not a constitutional attack, and second that the Department of Agriculture was dismissed from that case and the argu-

ment against them was moot, and an opportunity to appeal that matter was not presented to the Department of Agriculture for what we would determine appropriate determination of the court's jurisdiction.

Plaintiffs' have moved for a preliminary injunction. The four grounds for the granting of a preliminary injunction are well known; the substantial likelihood of success on the merits, irreparable injury, maintenance of the status quo and consideration of the public interest.

On the question of success on the merits, the Supreme Court in Flemming versus Nestor said, "that it is not on the slight implication and vague conjecture that the legislature is to be pronounced as having transcended its powers and its acts considered as void."

The statute that we are concerned with here must be held constitutional if there is any set of facts which can sustain its constitutionality.

Plaintiffs' have alleged it is violative on the equal [23] protection provisions and we would refer the Court to the case of Dandridge versus Williams in which the State of Maryland requirements of a maximum amount of aid to families with dependent children was considered.

There the Supreme Court stated, "that in the area of economic and social welfare, a state does not violate the equal protection clause merely because of classifications made by its laws were imperfect. If the classification has some reasonable basis, it does not offend the constitution merely because the classification is not made with mathematical nicety or results in some inequality."

We contend that those provisions of due process that is required of the states are applicable here.

The test is the test in Dandridge. The rights of the Plaintiffs they allege are being violated, are the rights to privacy, the right to association.

They have never been held to be contained in the Bill of Rights and in the Griswold case, that the Plaintiffs cite, the Supreme Court states specifically that neither right appears in the Bill of Rights.

They evolve from the right to be secure in ones home and the right not to have an invasion of an illegal search and seizure under the 7th Amendment.

These rights have been primarily defended in the case [24] of physical violations and intrusions into a home and criminal matters.

The Mapp versus Ohio case was a physical violation.

The case in Virginia where a gentleman complained that somebody was soliciting is a physical violation—intrusion.

The Griswold case concerned contraceptive information to married couples.

The Eisenstadt case, concerning contraceptive information to single people, concerned criminal violations.

Plaintiffs' herein are not charged with any criminal violations.

These rights are at most within the penumbra of the Constitution.

The Congress in 1964 extended food stamps to households. The Plaintiffs in quoting from the purpose of the Act, refer repeatedly to the household orientation. Congress did not attempt to provide food stamps for all people, but just for households.

They did not attempt to totally alleviate malnutrition. They attempted to alleviate malnutrition and more adequately supply our nation's food abundance to households.

Several years went by and Congress took a new look at the food stamp program at which time they retreated to the traditional view of a household.

In safeguarding the health and providing nutrition, they wanted to give this on a household basis. When Congress extends benefits to a group of related individuals, the question the Court must decide is that extension of benefits to these related individuals, is it so irrational, is it unconstitutional and we contend not.

As early in 1884, the Supreme Court has stated and I quote, "persons who dwell together as a family constitute a household."

The Eighth Circuit in 1968 used the very phrase, household and family interchangeably in considering whether an 18 year old college student who was home on vacation was a member of his mother's household. He was between semesters.

In Fidelity and Casuality Company of New York versus Jackson, the Court stated, "the term household is customarily used to mean a number of persons who dwell together as a family."

In Plaintiffs argument–

JUDGE ROBINSON: It doesn't say anything about being related, does it? How are you going to define family?

MR. BRICKFIELD: Yes, this is true, Your Honor. We contend that the traditional concepts of a family are related people.

[26] JUDGE ROBINSON: Yes, but we are not dealing with tradition. We are dealing with legal concepts.

MR. BRICKFIELD: Congress–the term household is not unknown to Congress.

Congress has used it before and in the Internal Revenue Code–

JUDGE McGOWAN: I think what you are saying raises this question to me: Is there anything in the Act or legislative history that would indicate that Congress was

concerned with the morality of the people who were to get food stamps?

MR. BRICKFIELD: Nothing in the legislation concerning this—concerning the morality of the persons for whom food stamps were to be—

JUDGE McGOWAN: The purpose of the Act was to promote the movement of surplus products off farms and also to increase nutrition of poor people. Is that fair to say?

MR. BRICKFIELD: No, Your Honor, we contend it is to increase nutrition in households. We do think that—

JUDGE ROBINSON: You are going to define households according to what standards, the standard of morality or the standard of law and where is the legal standard?

MR. BRICKFIELD: The legal standard we contend would be the same standard as contained in the Internal Revenue Code. They have used that phrase in the Internal Revenue Code and they have also defined families, Your Honor, in the aid to [27] families with dependent children provisions.

The Supreme Court in Dandridge referred very frequently—

JUDGE McGOWAN: I could be a household within the meaning of the statute living alone, right?

MR. BRICKFIELD: Yes, an individual is defined as a household. When an individual decides to associate with others then—

JUDGE ROBINSON: As a family?

MR. BRICKFIELD: As a family, then he becomes eligible but only in a related sense for food stamps.

In the aid to families with dependent children, a child who is living with a person—

JUDGE McGOWAN: Congress was not movitated by that purpose for the first several years of the Act, right? The statute specifically read that it did not make any difference whether they were related or not related.

MR. BRICKFIELD: Yes.

JUDGE McGOWAN: In changing that concept, did Congress indicate its purpose was one of morality?

MR. BRICKFIELD: Congress—the only congressional contention that we see is the congressional intention that the hippy communes would not be included. What morality we can read [28] into that, I am not sure.

The exact intention of Congress, Your Honor, is not the only criteria which we can regard.

If there is any criteria by which Congress could have passed this provision, and if Congress put into the legislative history that we are doing this to maintain family units, then this Court must consider that as a rational basis.

JUDGE McGOWAN: But they didn't.

MR. BRICKFIELD: That is not relevant, Your Honor.

Why Congress passed an Act may help in assessing its constitutionality, but the Supreme Court held that if there is any rational basis that Congress could have used to pass an Act, the Act should be sustained.

JUDGE McGOWAN: The Supreme Court also has held that when you start making classifications, they must be related to some relevant purpose by the statute.

MR. BRICKFIELD: Yes.

JUDGE McGOWAN: So to the extent that you are talking about the equal protection argument, the purpose of passing an enactment is highly relevant. Is that correct?

MR. BRICKFIELD: Well, I think, Your Honor, in looking at the legislative history here that they intended to exclude communal groups and I think it allows an

implication that [29] related people only receive these benefits, a family, and I think a family–

JUDGE McGOWAN: Suppose a man and a woman live quiet and they are not married and are poor. Are they excluded?

MR. BRICKFIELD: They are excluded.

JUDGE McGOWAN: Why, because they are really hippies or because–

MR. BRICKFIELD: No. Your Honor, because they are not related.

The relation Congress has given in the granting of–the availability of a joint tax return to married people and if one were to live with an unmarried person, one cannot file a joint tax return. This has been upheld, the constitutionality of the marriage requirements in the Internal Revenue Code.

This is a rational distinction that these people also cannot file a joint tax return and they are also not eligible for food stamps.

If a young child comes in and as the Hejny's here, a young waif off the street, they would not be eligible for aid to families with dependent children. This is all part of a greater plan, I think, in which we are trying to contain ourselves into this traditional family unit and I do believe that is the rational reason for this.

[30] Certainly when Congress attempts to alleviate hunger, we cannot say they cannot attempt to help another problem also.

The original purpose of this Act was agricultural. Section 16-D of the Act provides though that the budgetary considerations should be considered under the welfare provisions, but in attempting to get rid of the agricultural surpluses, they were going to do some good and provide them to certain persons.

JUDGE McGOWAN: Now, the morality of the person who eats has no relation to the agricultural circumstance. The more the merrier, right?

Nutrition also does not depend upon morality, I take it?

MR. BRICKFIELD: That is true, Your Honor.

JUDGE McGOWAN: It seems to me that if you are going to argue morality, with respect to the equal protection argument, you are going to have to establish that this is one of the purposes of Congress.

MR. BRICKFIELD: Your Honor, we contend that we do not have to argue that.

That if Congress has specifically said its purpose–if that is enough to sustain that–

JUDGE McGOWAN: That would be highly relevant, would it not?

[31] MR. BRICKFIELD: Assume arguendo it would be enough and if it is enough, then we contend that this Court must sustain that statute.

JUDGE ROBINSON: But you want us to arrive at it by implication. You want us to find that this was an underlying cause.

MR. BRICKFIELD: No, Your Honor. We want you to find that there was some rational basis, rational set of facts somewhere that Congress could have passed this Act on, and if you can find that, then this statute must be upheld. That is what we contend Flemming versus Nestor is.

JUDGE McGOWAN: Why don't you finish what you have to say, Mr. Brickfield.

MR. BRICKFIELD: We feel that the provisions and definition of household in the Internal Revenue Code shows congressional knowledge of that term and that Congress used this specifically with that in mind.

JUDGE McGOWAN: What is that definition again?

MR. BRICKFIELD: They used related persons and they do list the degree of continunity, mother, father, brother, sister and aunts and uncles.

In the Dandridge case, the Supreme Court stated specifically that Congress has intended to use the ADC to assist families, and it was to help dependent children, and a child is [32] dependent who has no resources and Congress limited it to those who were living with relatives and the Supreme Court upheld that and Mr. Justice Douglas in his dissent, and I don't think he could be termed as the most conservative member of the Court, stated that the purpose of aiding the family was valid.

Congress has a valid purpose in maintaining the family unit although the purpose of the statute was to aid a child.

This we feel is a compelling reason and in summary, we contend that if there is any rational set of facts that would allow this Court to uphold that statute, this Court is so obligated.

Thank you.

JUDGE McGOWAN: Thank you, Mr. Brickfield.

This record is certified by the undersigned to be the official transcript of the above-entitled proceedings.

/s/ Dawn T. Copeland
Official Court Reporter

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Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-534

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., APPELLANTS

v.

JACINTA MORENO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE APPELLANTS

1. In their brief in this Court, appellees repeatedly refer to an "unrelated household provision" in the Food Stamp Act,[1] a provision they deem unconstitutional. But the Act contains no such provision. Instead, Section 3(e) of the Act[2]—the statute at issue in this case—provides in relevant part that "household" means "a group of related individuals * * *"; since eligibility for food stamps is determined on a household basis, only such households are entitled to participate in the program.

Of course, everyone not included under the Act's definition of eligibility is excluded and unrelated

[1] *E.g.*, Appellees' Brief, at pp. 1, 2, 10, 11, 12, 14, 15, 16, 21, 24, 26, 27, 30, 32, 36, 37, 38, 43, 60, 61, 63.

[2] 7 U.S.C. 2012(e).

households therefore do not qualify. But our point is that this Court should obviously consider the specific statute involved in this case, which makes related households eligible for food stamps, rather than appellees' non-existent "unrelated household provision." This is no mere technical quibble. For what must be determined here is whether the Constitution permitted Congress to provide food stamps only to related households, or, more precisely, whether under the Due Process Clause of the Fifth Amendment Congress could constitutionally choose to go only this far and no farther.[3]

As in *Katzenbach* v. *Morgan*, 384 U.S. 641, 656–657 (discussed in *San Antonio School District* v. *Rodriguez*, No. 71–1332, decided March 21, 1973, slip op. at p. 34), the complaint here is "that Congress violated the Constitution by not extending the relief effected [to others similarly situated] * * *." The resolution of this complaint does not turn on whether the objectives of the Act might have been furthered if Congress had included unrelated households.[4] The controlling issue is whether in providing food stamps to related households

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[3] As we explained in our main brief, at p. 14, it is of no constitutional significance that in the original Act Congress defined households to include both related and unrelated persons living together. There is no difference between Congress' taking only one step forward or, instead, taking two steps forward and one backward. The result is the same in either case and in both situations the question under the Fifth Amendment is whether Congress had a rational basis for stopping where it did in defining the standards for a household's eligibility for food stamps.

[4] For example, in *Dandridge* v. *Williams*, 397 U.S. 471, the State computed a family's benefits under the AFDC program

Congress served the Act's purposes and had a rational basis for stopping there.

There is no dispute that participation by related households in the food stamp program serves the Act's purposes of raising the level of nutrition among low-income households and strengthening the agricultural economy. 7 U.S.C. 2011. The issue here is a different one: whether Congress had a rational basis for including only related households in the program. Appellees argue that Congress' decision to do this was a bolt from the blue, hastily conceived in the Conference Committee during the closing days of the Session, without careful consideration (Appellees' Brief, at pp. 22, 23, 41). Even if this were so, it would not be relevant.

But in any event food stamp eligibility of voluntarily unemployed persons, such as groups of unrelated college students and groups of unrelated people that chose to

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on the basis of the number of children in the family, but imposed a ceiling on the amount of the grant regardless of the family's size. Even though allowing additional benefits for more children, without having any maximum grants, would surely have served the purposes of the program to aid needy families with dependent children, this Court nevertheless upheld the State's maximum grant provision under the Equal Protection Clause of the Fourteenth Amendment because the provision had a rational basis. (The maximum grant provision furthered the State's interest in encouraging employment and maintaining an equitable balance between welfare families and the working poor.) 397 U.S. at 486–487.

Thus, appellees' argument that participation in the food stamp program by unrelated households would also further the Act's purposes (Appellees' Brief, at pp. 12–17) does not lead to the conclusion that Congress' failure to include such households violated the Fifth Amendment.

adopt a communal life-style, had been a matter of congressional concern from the outset, as the hearings on the food stamp program reveal. See, *e.g.*, Hearings before the House Committee on Agriculture on the General Farm Program and Food Stamp Program, 91st Cong., 1st Sess., pp. 17–18, 797, 861, 879–880, 901–902. Indeed, Congress had been presented with evidence that in the first county in California to adopt the food stamp program, as well as in other counties in the State and elsewhere, a large percentage of those participating by 1969 were in the category of voluntarily poor: 38.6 percent of the "nonassistance" [5] households receiving food stamps in the county were groups of college students and 42.4 percent were groups of persons who had joined together to adopt a communal life-style. *Id.* at 901–902. These concerns were echoed during the floor debates both before [6] and after [7] the Conference Committee reported the bill containing the present Section 3(e) making only related households eligible for food stamps.

As we have argued in our main brief, at pp. 14–18, in setting standards for food stamp eligibility, Con-

[5] "Nonassistance" households are those households that are not receiving public assistance under welfare programs. Cf. 7 U.S.C. 2019(c). See also Appellees' Brief, at p. 4 n. 1.

[6] 116 Cong. Rec. 42003 (Rep. Foley); 42021 (Rep. Belcher) (1970). Representative Foley, joined by Representative Quie, proposed a substitute bill, which contained a provision "exclu[ding] from the concept of a household any group of six or more individuals no more than two of whom are related to one another by blood, marriage, or adoption." *Id.* at 42003. The Foley-Quie substitute was defeated by a close vote (183–172). *Id.* at 42032.

[7] *Id.* at 44431 (Sen. Ellender); 44439 (Sen. Holland).

gress could rationally conclude that if it went beyond related households to encompass unrelated households as well, this might qualify groups of unrelated individuals such as those mentioned above and that the program should therefore not extend that far. In any public assistance program, priorities must be set in order to allocate "limited public welfare funds among the myriad of potential recipients." *Dandridge* v. *Williams, supra,* 397 U.S. at 487, citing *Steward Machine Co.* v. *Davis,* 301 U.S. 548, 584–585; and *Helvering* v. *Davis,* 301 U.S. 619, 644. In determining priorities, Congress legitimately and rationally decided to limit the program to related households in light of the greater potential for abuse by groups of unrelated persons who choose to remain voluntarily poor, who might be receiving undisclosed assistance from relatives living elsewhere, or who have living arrangements that are more fluid and temporary, thereby giving rise to administrative difficulties in continually certifying household eligibility on the basis of size, income and other factors.[8] In so deciding, Congress did not focus on "hippy" communes because these were politically unpopular groups, as appellees assert,[9] but rather because these were in large part groups of persons who were voluntarily poor and therefore less deserving of food stamps on a scale of priorities which Congress could rationally follow.

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[8] See our main brief, at pp. 15–17.

[9] Appellees' Brief, at pp. 17, 20–21, 60.

It is no answer to say, as appellees do,[10] that there were other methods available for preventing abuses by unrelated households, such as criminal sanctions, 7 U.S.C. 2023(b) and (c), and work requirements, 7 U.S.C. 2014(c), and that Congress therefore acted irrationally when it made only related households eligible for food stamps. Congress knew that such abuses would be difficult to detect, that "there is a definite problem with respect to eligibility—the extent to which it is checked, and to see that the entitlement of people to the stamps is properly supervised and watched,"[11] and that "there is a real problem of administrative control."[12] And this knowledge additionally served as a rational basis for Congress' including in the food stamp program only related households where these problems would not be as acute.

"Of course, every reform that benefits some more than others may be criticized for what it fails to accomplish." *San Antonio School District* v. *Rodriguez, supra,* at p. 35. And appellees correctly point out that by extending food stamp eligibility only to related households, Congress may not have alleviated the plight of persons such as appellee Moreno and others, who appear in need of the assistance food

[10] Appellees' Brief, at pp. 28–32, 62–63.

[11] House Hearings, *supra*, at 695 (testimony of Rep. Michel).

[12] *Ibid.* See also 116 Cong. Rec. 41982–41983; 41993 (Rep. May: "Inadequate or loose certification procedures are a major source of program abuses, and it is these abuses which generate public antipathy toward the program."); 42026 (Rep. Conte: "[T]he only means for dealing with fraud is through criminal prosecution—a method that has not worked in the past.").

stamps could provide.[13] But to uphold the constitutionality of Section 3(e) this Court is not required to find that it "is wise, that it best fulfills the relevant social and economic objectives that [Congress] might ideally espouse, or that a more just and humane system could not be devised." *Dandridge* v. *Williams, supra,* 397 U.S. at 487; see also *Jefferson* v. *Hackney,* 406 U.S. 535, 546; *Lochner* v. *New York,* 198 U.S. 45, 75 (Mr. Justice Holmes, dissenting)[14]. The question instead is whether Congress had a rational basis for legislating as it did and, as we have argued above and in our main brief, we believe Section 3(e) should be sustained under that standard of judicial review because Congress did not act irrationally in limiting eligibility to related households.

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[13] Appellees' Brief, at pp. 36–38. But cf. p. 10, *infra.*

[14] While framed in terms of Equal Protection, the Fifth Amendment challenge to Section 3(e) of the Food Stamp Act is quite similar to the type of substantive Due Process challenge in *Lochner* to the maximum 60-hour workweek for bakers, see *Dandridge* v. *Williams, supra,* 397 U.S. at 484; *Richardson* v. *Belcher,* 404 U.S. 78, 81; *Jefferson* v. *Hackney, supra,* 406 U.S. at 546–547. (The Equal Protection argument in *Lochner* would simply have been that the 60-hour maximum workweek unlawfully discriminates against bakers who would not suffer any impairment in their health by working more than 60 hours and desired to work longer because they needed the extra income.) There appears to be no relevant difference between determining whether Congress has acted arbitrarily in violation of the Due Process Clause, cf. *Ferguson* v. *Skrupa,* 372 U.S. 726, or legislated without a rational basis in violation of the Equal Protection Clause of the Fourteenth Amendment as incorporated in the Due Process Clause of the Fifth Amendment. (See Mr. Justice Stewart concurring in *San Antonio School District* v. *Rodriguez,* No. 71–1332, decided March 21, 1973, slip op. at p. 2: "it has long been settled that the Equal Protection Clause is offended only by laws that are invidiously discriminatory—only by classifications that are wholly arbitrary or capricious.")

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